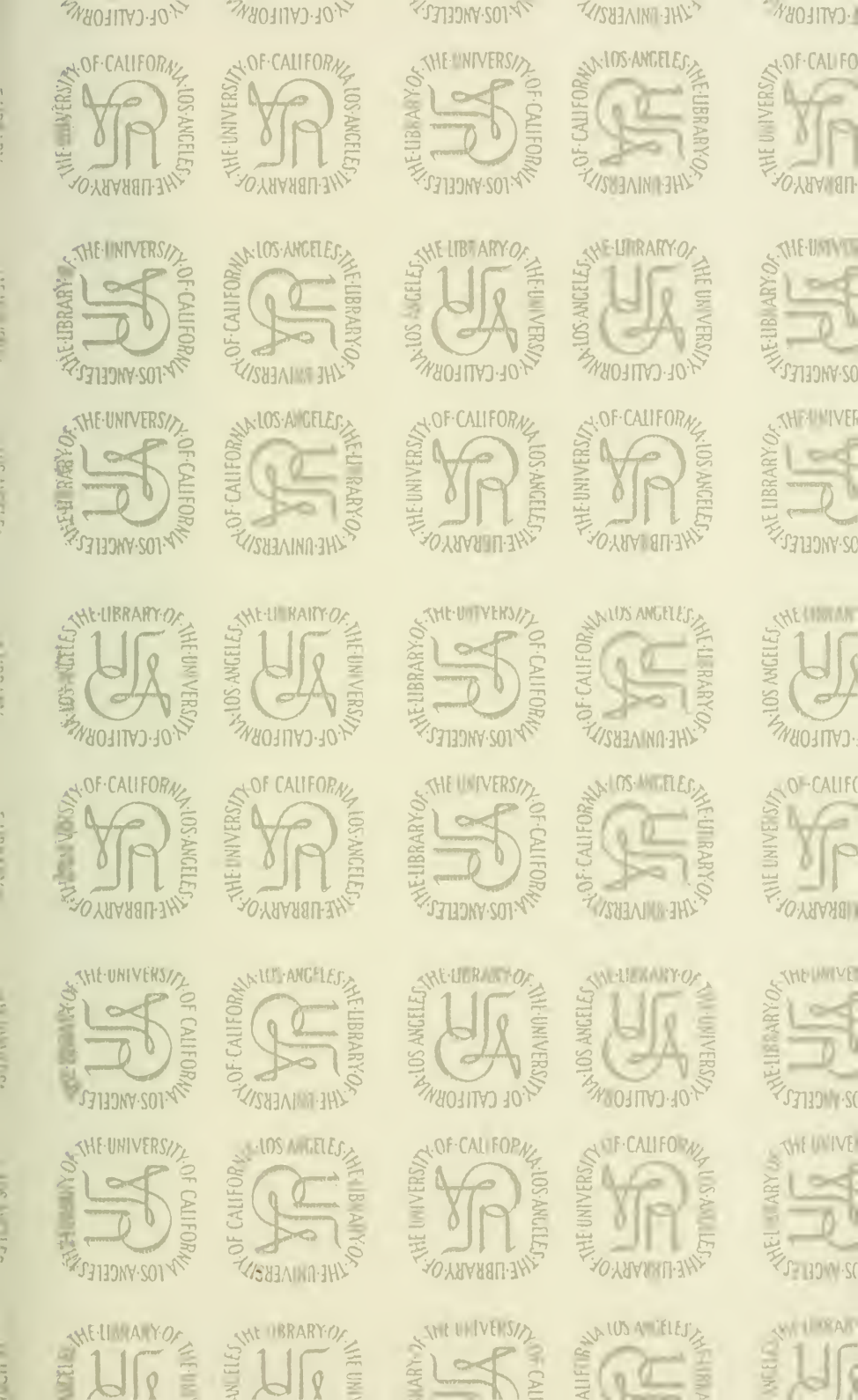
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THE

LAW AND PRACTICE

OF THE

MUNICIPAL COURT

OF THE

CITY OF NEW YORK

WITH THE

BOUNDARIES OF BOROUGHS, DISTRICTS, AND WARDS, AND ALSO THE LATEST DECISIONS AFFECTING THIS COURT

WITH FORMS AND EXHAUSTIVE INDEX

BY

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See Supplement at End of Book.

FIFTH EDITION

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PREFACE TO FIFTH EDITION.

The Fourth Edition of our work, published in the year 1898, necessarily embraced and contained the unrepealed Session Laws, General and Special Statutes, the District Court Act (Laws 1857, chap. 344) and its various amendments, the Consolidation Act (Laws 1882, chap. 410) and its amendatory acts, the Greater New York Charter (Laws 1897, chap. 378), numerous sections of the Code of Civil Procedure and its various amendments. From such an incongruous mass of laws, that edition was evolved, and it had become evident to the justices and members of the bar, that such a conglomerated mass of legislative enactments often caused grave doubts as to the jurisdiction, procedure, and practice of this court, especially since the adoption of the Charter, which increased its jurisdiction, as to amount, to the sum of five hundred dollars, and in many respects made it an important tribunal.

In order to remedy these defects and restore "order out of chaos," the Legislature passed an act (Laws 1901, chap. 218), entitled "An act to provide for a commission to revise, amend, reform, simplify, abridge, and codify the laws, rules, practice, pleadings, forms, and proceedings of the Municipal Court of the City of New York, and the laws, rules, *et cetera,* relating to the clerks, officers, and attendants thereof, and the marshals attached thereto."

Under this act, the Commission (which consisted of the board of justices of this court) appointed *seven of* their

number to carry out the provisions of the act. On the 27th day of January, 1902, the Commission made its report to the Legislature, which is printed in full in this work. This report (among other things) states: "It was the object of the Commission to report a practice act, to preserve, amplify, and make more efficient statutory provisions affecting a court, the history of which can be traced as far back as the year 1759, and which at one time was a court of record. (Langbein's District Court Practice, First Edition Preface, Laws 1813, chap. 86, § 10.)"

The First Edition of our work thus cited was published in the year 1872, but the statement and proof that this court was at one time a court of record is not to be found in the "Preface" of that edition, but in a chapter upon "The District Courts in the City of New York; Their Creation, Organization, and History." Neither is the section of Laws 1813, chap. 86, cited as section 10, correctly cited, the section being section 107.

A continuation of the organization and history of the court from the year 1872 is contained in the "Preface" to the Second Edition, published in the year 1880; in the "Preface" to the Third Edition, published in the year 1894, and also in the "Preface" to the Fourth Edition.

After conflicting decisions in the Appellate Term and Appellate Divisions (First and Second Departments), the Court of Appeals, in the case of *Worthington* v. *London Guarantee & Accident Co.*, 164 N. Y. 81, decided that "this court, as created by the Greater New York Charter (Laws 1897, chap. 378, § 1351) is not a new court, but a *continuation, consolidation,* and *reorganization* of the former district courts of the old city of New York, and the

justices' courts in the first, second, and third districts of the old city of Brooklyn, under a new name."

By the new enactment, "all acts and parts of acts" affecting this court are repealed, and the statutory law governing the court is hereafter to be found in this act, which takes effect *September* 1, 1902, known as chapter 580 of the Laws of 1902, and by section 365 thereof, "may be cited as the Municipal Court Act of the City of New York."

We have only space in a preface to give a few of the main features of this new enactment.

The complicated provisions for long and short summons as to nonresident defendants is omitted, while jurisdiction is extended to all actions for damages for fraud or deceit; to loss of services, or medical or other necessary expenses occasioned by personal injuries; to an action upon a surety bond or undertaking given in *any* court. The power of the marshal to execute process is extended over the four counties and five boroughs of The City of New York. Substituted service and interpleaders are provided for. The time of the justice to render judgment is extended from eight to fourteen days, and parties may submit a controversy upon an agreed case as in courts of record. There is a *graduated* scale of costs and a *remittitur* on appeal. The justice is given power, either in an action or summary proceeding, to direct or set aside a verdict, vacate, amend, or modify a judgment, or grant a new trial on the ground of fraud, or newly-discovered evidence, to grant or vacate a stay, and any person over the age of eighteen years may serve a summons without being deputized by the justice.

The law and practice of "Summary Proceedings" is not treated of in this, as it has not been in former editions.

We must respectfully, but firmly, differ from the statement in said report that "this court is primarily the poor man's court, and so have preserved in the main the features that gave it that appellation." Many sections of this new law contradict that statement, but we have only space to even briefly mention one, viz., section 274, "Judgment in Favor of Wage-Earners." It is the shortest "Statute of Limitation" on record, especially when applied to a "wage-earner," and while we do not criticise, nor does space permit us to argue, we doubt its constitutionality.

We will thank the justices and members of the bar for information as to any errors they may discover, in order that correction may be hereafter made.

NEW YORK CITY, *August* 18, 1902.

GEORGE F. LANGBEIN,
J. C. JULIUS LANGBEIN.

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REPORT OF COMMISSION.

STATE OF NEW YORK.

No. 36.

In Assembly, January 27, 1902, Report of the Commission Appointed to Revise and Codify the Laws Relating to The Municipal Court of the City of New York.

To the Legislature:

Under the provisions of chapter 218 of the Laws of 1901, Justices George F. Roesch, Joseph P. Fallon, and Francis J. Worcester of Manhattan, John M. Tierney of The Bronx, Gerard B. Van Wart of Brooklyn, John J. Kenney of Richmond, and William Rasquin, Jr., of Queens, were designated, by the Board of Justices of the Municipal Court of The City of New York, a Commission to revise and codify the laws relating to that court, its officers, and marshals.

The Commission organized by the election of Justice George F. Roesch as chairman, Justice William Rasquin, Jr., as secretary, and selected Hon. Cornelius F. Collins as its clerk.

Since the adoption of the Greater New York Charter, the Municipal Court of that city has become an important tribunal. The consolidation of the old Justices' and District Courts into Municipal Court made it desirable, and, indeed, necessary for the proper administration of justice in the reorganized court that the laws applicable to it should be readily ascertained. They were however only to be found after laborious and unsatisfactory research. They were contained in unrepealed general and special statutes, the District Court Act of 1857 and its amendatory acts, numerous statutes affecting the old justices' courts, the Consolidation Act of 1882 and its amendatory statutes, The Greater New York Charter, Code of Civil Procedure, and Rules of Court. Such

a mass of enactments often caused grave doubt as to the jurisdiction and procedure in the reconstructed court, and there was a marked lack of uniformity in the practice in it.

The present Commission was created to afford a remedy for such a condition. The main purpose of the Commission has been to revise and codify all the laws governing the Municipal Court, and embody them, as far as practicable, in one act. The Commission wished further to simplify the practice within the limited jurisdiction of the court, and make possible resort to remedies afforded by the Code of Civil Procedure, the absence of which from this court has frequently resulted in failure of justice.

It was the object of the Commission to report a Practice Act to preserve, amplify, and make more efficient statutory provisions, affecting a court the history of which can be traced as far back as the year 1759, and which at one time was a court of record. Langbein's District Court Practice (1st ed.), preface; Laws 1813, chap. 86, § 10.

Judge Haight of the Court of Appeals, in his opinion in the case of *Worthington* v. *The London G. & A. Co.*, 164 N. Y. 192, recognizes more fully the importance of this court. He asserts the right of the Legislature to confer any jurisdiction upon this court it may, in its wisdom, determine. He shows that the Municipal Court is a District Court within the provisions of article 6, section 17 of the Constitution, with "such power as the Legislature shall provide, and there is no limitation whatever." He also shows conclusively that the Legislature could confer even greater jurisdiction upon this court than that possessed by the County Courts. There can therefore be no question as to the power of the Legislature to pass the act herewith presented.

The changes are merely in the direction of the greater efficiency of the court within its jurisdiction. They are, likewise, adaptations of remedies afforded by the Code of Civil Procedure to this court. The Commission has been conservative in its work, and has not lost sight of the fact that this court is primarily "the poor man's court" and so has preserved in the main the features that gave it that appellation. On the other hand, the increase in its jurisdiction since the passage of the Greater New York Charter has led

to a large increase in its business and has brought to it an unusual amount of litigation which demands broader remedies than previous statutes afforded.

There has been some diversity of opinion as to the jurisdiction in amount that should be conferred upon this court, as to the advisability of repealing the provision for the removal of an action from the Municipal into the City or Supreme Court, and as to the subject of the rotation of the justices.

The Commission calls attention to the fact that the Municipal Court of the city of Syracuse and several city courts in the State have jurisdiction to the amount of $1,000, and that the congested condition of the calendars of the courts of record in Greater New York would be much relieved by conferring such jurisdiction on the Municipal Court.

As to the right of removal, it must be borne in mind that under the proposed act a defendant in certain cases in this court will have the right of trial by a jury of twelve. Removal is frequently resorted to by defendants only for purposes of delay. It is a relic of the practice in courts of justice of the peace as they formerly existed in New York City and serves no beneficial purpose in the interests of justice today. Furthermore under the decision in the case of *Levine* v. *Hahner*, 62 App. Div. 195, neither party in an action removed from these courts is now entitled to any costs.

As to rotation, there is a manifest impropriety in requiring justices who are elected by a particular constituency to hold court in districts where the people have no voice in their selection. Moreover it is an injustice upon the people who select them because they are deprived of their chosen officials. A strict compliance with the existing law would require the justices of the borough of Manhattan to be absent from the district for which they were elected, eleven out of twelve months of the year. It might as well be urged that the several county judges throughout the State should rotate from county to county. Stronger reasons might be advanced why this should be done because there are but few of the counties up the State having as large a population as that embraced in any of the districts of The City of New York, especially in the borough of Manhattan. There is an

average population in the Municipal Court districts of between 250,000 and 300,000 people. The suggestion that the justice may be affected by local influences is unsound and absurd. Considering the very large number of people within each district it would be impossible for him to be acquainted with more than an exceedingly small percentage of the entire number, and mere acquaintance does not impair the efficiency of a justice.

Under the present law a litigant or a justice may call a common-law jury of twelve. This is entirely optional with the litigant, and a jury trial may be invoked by either side. Another serious objection to taking the justices away from their own district is found in the fact that the justices are required to certify the pay-rolls each month from the court for which they were selected or appointed, and sign returns on appeal in cases tried by them in different courts where papers and exhibits are in the custody of different clerks. The justice appoints the clerks, attendants, and other officials of his own court only. He is expected to have supervision of their conduct. The question may well be asked how can he have supervision or certify their pay-rolls each month if he is away from his court the greater part of a year. It is evident that confusion might necessarily result from his absence. Again, rotation results in a divided responsibility as to the calendar and disposition of business in the court, and destroys that fixed responsibility which enables the public and the profession to judge of the efficiency of its servants. With reference to the comparison between the population of the several districts of the Municipal Court and that of the County Courts, it may be well to call attention to the fact that, excepting the counties of New York, Kings, and Erie, the average population of the counties of this State does not exceed 65,000. In other words, in most of the judicial districts of the old city of New York, the population is as great, at least, as that of four counties throughout the State.

The Commission is, however, so earnestly of opinion that the adoption of a single statute with reference to this court is an urgent necessity that individual members of it yielded their views to accomplish the desired result, and the pro-

visions alluded to are not changed herein, but are left to the consideration of the Legislature.

Future legislation should be in the shape of amendments to this act.

Statutes necessarily repealed by the terms of this act, such as that of 1857, are not expressly mentioned in the schedule, in order to preserve the position recognized in recent decisions of the Court of Appeals that the Municipal Court is not a new tribunal, but a continuation of the former District Courts.

It was deemed best to leave the sections affecting summary proceedings in the Code of Civil Procedure, rather than to transfer them bodily to this act, though, of course, jurisdiction over them is given herein.

The former provisions for long and short summonses as to nonresident defendants is omitted as being of no practical advantage. It only gave rise to useless questions of mere practice.

Sections 1350 and 1351, 1353 to 1363, both inclusive, 1373, 1424 to 1427, both inclusive, of the Greater New York Charter, which abolish former courts, define the present court, prescribe the qualifications of justices, oath of office, salary, term, manner of filling vacancies, boundary of districts, appointments, removal and terms of clerks, assistant clerks, stenographers, interpreters, court attendants, remain without change in the charter itself, and are in nowise affected by any provision of this act.

A table shows the disposition of the laws repealed and is bracketed so as not to form a part of the act.

The changes recommended are plainly indicated throughout the proposed act.

All of which is respectfully submitted.

NEW YORK, *January* 15, 1901.

GEO. F. ROESCH,
FRANCIS J. WORCESTER,
JOS. P. FALLON,
JNO. J. KENNEY,
WM. RASQUIN, JR.,
JOHN M. TIERNEY,
GERARD B. VAN WART.

THE MUNICIPAL COURT

OF THE

CITY OF NEW YORK.

NAMES OF THE JUSTICES, CLERKS, COURT OFFICIALS, AND MARSHALS, WITH THEIR RESIDENCE, DAYS, PLACES OF HOLDING COURT, AND TELEPHONE NUMBER.

BOROUGH OF THE BRONX.

FIRST JUDICIAL DISTRICT.

Court held at Town Hall, Main St., Westchester.
Trial days, Tuesday and Friday.

Justice, WILLIAM PENFIELD, Wakefield.
Clerk, THOMAS F. DELAHANTY, 76 Elliott Ave.
Assistant Clerk, WILLIAM D. MILLER, Wakefield.
Stenographer, LUCIUS W. HOWE, Bronxwood Park.
Interpreter, ROBERT VOLLBRACHT, 674 East 144th St.
Attendants, STEPHEN COLLINS, Prospect St., City Island.
JOHN H. COMAN, Main St., Westchester.
Marshal, GEORGE HARTELL, Wakefield, and 151 East 121st St.

SECOND JUDICIAL DISTRICT.

Court held at southwest corner of 158th St. and 3d Ave.
Trial days, every day except Saturday, Sunday, and legal holidays.

Justice, JOHN M. TIERNEY, Southern Boulevard, near Valentine Ave.
Clerk, THOMAS A. MAHER, 1266 Boston Road.
Assistant Clerk, JOHN MONAGHAN, 165th St. and Sherman Ave.

Stenographer, WILLIAM M. BROWNE, Hunts Point.
Interpreter, ROBERT VOLLBRACHT, 674 East 144th St.
Attendants, TIMOTHY J. KELLY, 758 East 162d St.
PETER KOELBLE, 737 Forest Ave.
FREDERICK JOHNSON, 661 East 142d St.
Marshals, DAVID W. ERSKINE, 689 East 135th St.
GEORGE RUDOLPH, 1759 Sedgwick Ave.
JAMES MCCAULEY, 2641 Marion Ave.

BOROUGH OF MANHATTAN.

FIRST JUDICIAL DISTRICT.

Court held at 128 Prince St.
Trial days, Tuesday, Wednesday, and Thursday.

Justice, DANIEL FINN, 569 Broome St.
Clerk, FRANK L. BACON, 582 Broome St.
Assistant Clerk, STEPHEN MCFARLAND, 191 Prince St.
Stenographer, EDWARD C. MANNERS, 968 St. Nicholas Ave.
Interpreter, BRUNO BOCKS, 107 Varick St.
Attendants, JOHN MCGRATH, 20 Greenwich St.
MICHAEL BRENNAN, 576 Broome St.
Marshals, LOUIS LEVY, 308 East 51st St.
EDWARD H. HEALY, 8 Grove St.
Telephone, 1430 Spring.

SECOND JUDICIAL DISTRICT.

Court held at 172 Grand St.
Trial days, every day except Sundays and legal holidays.

Justice, HERMAN BOLTE, 3 New Chambers St.
Clerk, FRANCIS MANGIN, 285 Mott St.
Assistant Clerk, JAMES P. DIVER, 88 Madison St
Stenographer, BENJAMIN F. SPELLMAN, 26 Oliver St.
Interpreter, HUGH TAGGART, 183 Mulberry St.
Attendant, JAMES MCCULLOUGH, 73 Centre St.
Marshals, WILLIAM ALT, 187 Delancey St.
JAMES A. LOFTUS, 172 Grand St.
CHARLES CRUISKY, 172 Grand St.
Telephone, 2416 Spring.

THIRD JUDICIAL DISTRICT.

Court held at 125 Sixth Ave.
Trial days, every day except Sunday and legal holidays.

Justice, WILLIAM F. MOORE, 111 West 11th St.
Clerk, DANIEL WILLIAMS, 66 West 10th St.
Assistant Clerk, THOMAS E. GORMAN, 108 Bank St.
Stenographer, VALENCOURT S. LILLIE, 30 East 10th St.
Interpreter, JOSEPH WEILL, 8 Van Nest Place.
Attendants, DANIEL B. MURPHY, 448 West 14th St.
MICHAEL BERGIN, 143 West 10th St.
JOHN J. GALLAGHER, 31 Carmine St.
Marshals, JAMES T. PANGBURN, 79 Jane St.
JOHN F. NEILSON, 43 Barrow St.
Telephone, 1365 18th St.

FOURTH JUDICIAL DISTRICT.

Court held at northeast corner 2d Ave. and 1st St.
Trial days, every day except Sunday and legal holidays.

Justice, GEORGE F. ROESCH, 109 East 10th St.
Clerk, JULIUS HARBURGER, 64 East 3d St.
Assistant Clerk, LAWRENCE MULLIGAN, 35 7th St.
Stenographer, CALEB H. REDFERN, 257 West 44th St.
Interpreter, HAROLD SPIELBERG, 80 1st St.
Attendants, EMIL BAYER, 316 Bowery.
DANIEL B. MCCARTHY, 108 East 56th St.
Marshals, JACOB SUBIN, 21 Forsyth St.
JOHN WOERNER, 30 1st St.
GABRIEL L. LOWENTHAL, 335 East 79th St.
Telephone, 5252 Spring.

FIFTH JUDICIAL DISTRICT.

Court held at 154 Clinton St.
Trial days, every day except Sunday and legal holidays.

Justice, BENJAMIN HOFFMAN, 271 7th St.
Clerk, THOMAS FITZPATRICK, 258 Henry St.
Assistant Clerk, JAMES H. SHEILS, 283 East Broadway.

Stenographer, LOUIS S. POSNER, 171 Rivington St.
Interpreter, JACOB KATZ, 160 East 72d St.
Attendants, JAMES MCALARNEY, 438 East 116th St.
CHARLES J. NEWMAN, 293 7th St.
PATRICK REILLY, 551 Grand St.
Marshals, SAMUEL I. ABRAMSON, 248 East Broadway.
MORRIS EINSTEIN, 311 East 4th St.
MAX GROSS, 153 Clinton St.
JACOB KATZENSTEIN, 734 5th Ave.
HENRY MYERS, 275 7th St.

SIXTH JUDICIAL DISTRICT.

Court held at 407 2d Ave.
Trial days, every day except Sunday and legal holidays.

Justice, DANIEL F. MARTIN, 245 East 33d St.
Clerk, ABRAM BERNARD, 956 Broadway.
Assistant Clerk, JAMES FOLEY, 314 East 19th St.
Stenographer, ISAAC E. GARVEY, 689 Greenwich St.
Interpreter, HENRY ALSHEIMER, 417 East 15th St.
Attendants, LAWRENCE COLLINS, 233 East 30th St.
ALBERT GOETTMAN, 304 East 18th St.
TERRENCE S. REILLY, 244 East 37th St.
Marshal, JAMES H. SMITH, Court House.
Telephone, 1302 18th St.

SEVENTH JUDICIAL DISTRICT.

Court held at 151 East 57th St.
Trial days, every day except Saturday, Sunday, and legal holidays.

Justice, HERMAN JOSEPH, 121 East 64th St.
Clerk, PATRICK MCDAVITT, 430 East 57th St.
Assistant Clerk, EDWARD MCQUADE, 1328 Lexington Ave.
Stenographer, GEORGE A. MOULTON, Court House.
Interpreter, FREDERICK FISCHER, 315 East 55th St.
Attendants, EDWARD T. FORAN, 156 East 87th St.
PATRICK CUNNINGHAM, 8 East 85th St.
WILLIAM FARLEY, 1357 2d Ave.
Marshals, CHARLES A. FARLEY, 1231 Lexington Ave.
MICHAEL GOODE, 407 East 57th St.
WILLIAM H. LEE, 157 East 57th St.

EIGHTH JUDICIAL DISTRICT.

Court held at northwest corner 23d St. and 8th Ave.
Trial days, every day except Saturday, Sunday, and legal holidays.

Justice, JOSEPH H. STINER, Marlborough Hotel.
Clerk, HENRY MERZBACH, 346 West 35th St.
Assistant Clerk, PETER J. GARVEY, 226 West 24th St.
Stenographer, HAROLD EYRE, 118 West 58th St.
Interpreter, ADOLPH M. LESLIE, 8 West 13th St.
Attendants, WILLIAM HEIM, 308 West 18th St.
CHARLES J. GEIGER, 432 East 89th St.
DANIEL WALSH, 329 East 88th St.
Marshals, JAMES W. SLATER, 224 West 20th St.
WILLIAM H. GODWARD, 449 West 23d St.
HENRY A. HOELZLE, 269 8th Ave.
JAMES BOYLAN, Court House.
WILLIAM H. BRODERICK, 323 West 18th St.
Telephone, 1335 18th St.

NINTH JUDICIAL DISTRICT.

Court held at 170 East 121st St.
Trial days, Tuesday and Friday.

Justice, JOSEPH P. FALLON, 1900 Lexington Ave.
Clerk, WILLIAM J. KENNEDY, 71 East 125th St.
Assistant Clerk, PATRICK J. RYAN, 172 East 94th St.
Stenographer, GEORGE ZIEGER, 165 East 121st St.
Interpreter, DIODATO VILLAMENA, 205 East 116th St.
Attendants, CHARLES L. LAMBERT, 94 East 114th St.
JOHN GOLDEN, 514 East 119th St.
ISAAC SILVERBLATT, 205 East 124th St.
Marshals, BERNATH KRANZ, 37 West 124th St.
GEORGE W. HARTELL, 151 East 121st St.
Telephone, 480 Harlem.

TENTH JUDICIAL DISTRICT.

Court held at 312 West 54th St.
Trial days, every day except Sunday and legal holidays.

Justice, THOMAS E. MURRAY, 305 West 46th St.
Clerk, HUGH GRANT, 346 West 56th St.
Assistant Clerk, GEORGE SEXTON, 226 West 82d St.
Stenographer, WILLIAM C. BOOTH, 59 West 76th St.

Interpreter, MARTIN SENGER, 732 9th Ave.
Attendants, CORNELIUS FOLEY, 342 West 47th St.
THOMAS CAMPBELL, 327 West 42d St.
JOHN F. WALSH, 39 West 60th St.
Marshals, ANDREW WAGNER, 362 West 45th St.
WILLIAM S. BORCHERS, 719 8th Ave.
GEORGE W. KLUNE, 261 West 114th St.
Telephone, 427 Columbus.

ELEVENTH JUDICIAL DISTRICT.

Court held at southwest corner 126th St. and Columbus Ave.
Trial days, Monday and Thursday.

Justice, FRANCIS J. WORCESTER, 462 West 144th St.
Clerk, HEMAN B. WILSON, 552 West 183d St.
Assistant Clerk, ROBERT ANDREWS, 200 West 130th St.
Stenographer, HARRY W. WOOD, 189 Audubon Ave.
Interpreter, VALENTINE J. HAHN, 458 West 131st St.
Attendants, FRANK MCGRATH, 56 Audubon Ave.
THOMAS H. MCCARRICK, 362 West 116th St.
Marshals, JAMES W. BARKER, 244 West 143d St.
FRANK C. LANGLEY, 313 West 117th St.
Telephone, 769 Harlem.

BOROUGH OF BROOKLYN.

FIRST JUDICIAL DISTRICT.

Court held at northwest corner State and Court Sts.
Trial days, Monday, Tuesday, Thursday, and Friday.

Justice, JOHN J. WALSH, 289 Bridge St.
Clerk, EDWARD MORAN, 242 Clinton St.
Assistant Clerk, JAMES A. DUNNE, 56 1st Place.
Stenographer, DUDLEY J. FAGAN, 1461 Dean St.
Interpreter, JOSEPH FLASH, 327 Grand St.
Attendants, MATHEW J. DOWD, 359 Bainbridge St.
JOHN J. MCMANUS, 387 Keep St.
CHARLES KOCK, 1036 Broadway.
Marshals, EUGENE MCCARTHY, 185 State St.
ROBERT W. OLIVER, 117 Court St.
JOHN W. IRWIN, 196 State St.
JOHN H. REARDON, 108 Court St.
MICHAEL J. DUFFY, 82 Court St.

SECOND JUDICIAL DISTRICT.

Court held at 794 Broadway.
Trial days, every day except Sunday and legal holidays.

Justice, GERARD B. VAN WART, 340 Putnam Ave.
Clerk, WILLIAM H. ALLEN, 255 Vernon Ave.
Assistant Clerk, EDWARD L. STRYKER, 302 Tompkins Ave.
Stenographer, CHARLES J. DOYLE, 75 Vanderbilt Ave.
Interpreter, JACOB F. BECKER, 121 Stagg St.
Attendants, SAMUEL A. ACKERMAN, 510 Monroe St.
J. NELSON MAGEE, 21 Sterling Place.
JOHN S. MATSON, 1166 Gates Ave.
Marshals, JOHN WAGNER, 544 Hart St.
CHARLES N. PRACHT, 780 Broadway.
ALBERT H. BLENDERMAN, 24 Fayette St.
Telephone, 582 Williamsburg.

THIRD JUDICIAL DISTRICT.

Court held at 6 Lee Ave.
Trial days, every day except Saturday.

Justice, WILLIAM J. LYNCH, 247 Leonard St.
Clerk, JOHN W. CARPENTER, 199 Kent St.
Assistant Clerk, ARTHUR J. HIGGINS, 43 Marcy Ave.
Stenographer, JOHN W. RICHARDS, 13 Halsey St.
Interpreter, EMIL KLEBAUER, 829 Manhattan Ave.
Attendants, WALTER P. CASEY, 97 Russell St.
EDWARD S. WILSON, 20 Putnam Ave.
PATRICK COURTNEY, 1731 Fulton St.
Marshals, BERNARD J. REILLY, Court House.
RICHARD WRIGHT, Court House.
FREDERICK C. MEYER, Court House.
FREDERICK C. CABBLE, Court House.
WILLIAM B. HOBBY, Court House.
Telephone, 785 Williamsburg.

FOURTH JUDICIAL DISTRICT.

Court held at 14 Howard Ave.
Trial days, every day except Saturday, Sunday, and holidays.

Justice, THOMAS H. WILLIAMS, 555 Decatur St.
Clerk, HERMAN GOHLINGHORST, 689 Bushwick Ave.

Assistant Clerk, JAMES P. SINNOTT, 118 Arlington Ave.
Stenographer, JOHN F. REILLY, 338 Hart St.
Interpreter, HYMAN RAYFIRL, 1701 Pitkins Ave.
Attendants, WILLIAM MCKEE, 176 Lorimer St.
ROBERT HILL, 935 Jefferson Ave.
LOUIS ULM, 13 Dittmars St.
Marshals, JOHN WAGNER, 544 Hart St.
DAVID GOLDBERG, 402 Sackman St.
Telephone, 363 Bushwick.

FIFTH JUDICIAL DISTRICT.

Court held at 22d St. and Bath Ave., Bath Beach.
Trial days, Monday, Tuesday, and Thursday.

Justice, CORNELIUS FURGUESON, Bath and 22d Aves.
Clerk, JEREMIAH J. O'LEARY, 275 58th St.
Assistant Clerk, EUGENE A. CURRAN, 184 Clarkson St.
Stenographer, JOSEPH N. B. RAWLE, 552 15th St.
Interpreter, ALFRED HUTTINGLER, Bay 25th St., near Cropsey Ave.
Attendants, JOHN F. DWYER, Kimball's Road.
PETER C. MOORE, 1917 Benson Ave.
CORNELIUS SNEDEKER, Cropsey Ave. and Bay 43d St.
Marshal, ALONZO F. GLOVER, 116 Ashland Place.
Telephone, 83 Bath Beach.

BOROUGH OF QUEENS.

FIRST JUDICIAL DISTRICT.

Court held at 46 Jackson Ave.
Trial days, Monday, Wednesday, and Friday.

Justice, THOMAS C. KADIEN, 140 12th St.
Clerk, THOMAS F. KENNEDY, 225 Grand Ave.
Assistant Clerk, EUGENE J. DENNEN, 147 9th St.
Stenographer, JOHN J. SULLIVAN, 36 Hoyt Ave., Astoria.
Attendants, THOMAS WHITE, 120 Broadway.
HENRY A. SMITH, 396 Ditmar Ave.
Marshal, CONRAD DIESTEL, 429 Jackson Ave., Long Island City.

SECOND JUDICIAL DISTRICT.

Court held at Broadway and Court St., Elmhurst.
Trial days, Monday, Wednesday, and Friday.

Justice, WILLIAM RASQUIN, JR., 137 Barclay St., Flushing.
Clerk, HENRY WALTER, Jr., Juniper Ave., Middle Village.
Stenographer, C. HERBERT BURNS, Richmond Hill.
Attendants, FREDERICK W. BIELING, Lexington Ave., Maspeth.
PHILIP PETERS, Jay Ave., Maspeth.
Marshals, AUGUST C. BRUST, Maspeth.
FRANK RYAN, 114 Broadway, Flushing.
Telephone, 4 Newtown.

THIRD JUDICIAL DISTRICT.

Court held at Town Hall, Jamaica.
Trial days, Monday, Wednesday, and Friday.

Justice, JAMES F. McLAUGHLIN, Jamaica.
Clerk, GEORGE W. DAMON, Jamaica.
Stenographer, JOHN L. GUYDIR, Jamaica.
Attendants, THOMAS FOX, Jamaica.
JOSEPH KESILER, Jamaica.
Marshals, WILLIAM N. GEORGE, Jamaica.
THOMAS J. HOBBY, Far Rockaway.

BOROUGH OF RICHMOND.

FIRST JUDICIAL DISTRICT.

Court held at Lafayette Ave. and 2d St., New Brighton, Staten Island.
Trial days, Tuesday and Thursday.

Justice, JOHN J. KENNEY, New Brighton.
Clerk, FRANCIS F. LEMAN, Port Richmond.
Assistant Clerk, ROBERT HUMPHREY, Port Richmond.
Stenographer, FRANK McGOEY, New Brighton.
Attendants, EDWARD FINNERTY, New Brighton.
FRANK LANGFORD, New Brighton.
Marshal, JAMES THOMPSON, Port Richmond.
Telephone, 98 West Brighton.

SECOND JUDICIAL DISTRICT.

Court held at Village Hall, Stapleton, Staten Island.
Trial days, every day except Sunday and legal holidays.

Justice, GEORGE W. STAKE, Stapleton — Post-office.
Clerk, PETER TIERNAN, Stapleton — Post-office.
Assistant Clerk, WILLIAM J. BROWNE, Stapleton — Post-office.
Stenographer, JOHN G. FARRELL, Stapleton — Post-office.
Attendant, CHARLES WARNECKE, Stapleton — Post-office.
Marshals, THOMAS MCCORMACK, 340 Bay St., Southfield.
ROBERT F. GOGGIN, Court House.
Telephone, 81 Tompkinsville.

THE
GREATER NEW YORK CHARTER

ENACTED IN 1897 AND AMENDED BY

Laws 1901, Chapter 466, relative to the Municipal Court of the City of New York.

AN ACT to amend the Greater New York Charter, chapter three hundred and seventy-eight of the laws of eighteen hundred and ninety-seven, entitled "An act to unite into one municipality under the corporate name of the City of New York, the various communities lying in and about New York harbor, including the city and county of New York, the city of Brooklyn and the county of Kings, the county of Richmond and part of the county of Queens, and to provide for the government thereof."

PASSED without the acceptance of the city. Became a law April 22, 1901, with the approval of the Governor. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. CHAPTER THREE HUNDRED AND SEVENTY-EIGHT OF THE LAWS OF EIGHTEEN HUNDRED AND NINETY-SEVEN, ENTITLED "AN ACT TO UNITE INTO ONE MUNICIPALITY UNDER THE CORPORATE NAME OF THE CITY OF NEW YORK, THE VARIOUS COMMUNITIES LYING IN AND ABOUT NEW YORK HARBOR, INCLUDING THE CITY AND COUNTY OF

New York, the City of Brooklyn, and the County of Kings, the County of Richmond and Part of the County of Queens, and to Provide for the Government Thereof," is hereby amended so as to read as follows:

CHAPTER I.

BOUNDARIES, BOROUGHS, POWERS, RIGHTS AND OBLIGATIONS OF THE CITY.

§ 1. The City of New York; corporations consolidated; territories; short title of this act.
2. Division into boroughs.
3. Name; power and rights of the corporation; seal.

The City of New York; corporations consolidated; territories; short title of this act.

CHARTER, § 1. All the municipal and public corporations and parts of municipal and public corporations, including cities, villages, towns and school districts, but not including counties, within the following territory, to wit: The county of Kings, the county of Richmond, the city of Long Island City, the towns of Newtown, Flushing and Jamaica, and that part of the former town of Hempstead, as it existed on the thirty-first day of December, eighteen hundred and ninety-seven, bounded on the east and north by the east and north bounds of the former village of Far Rockaway, and on the east by a line drawn due north from the northwest corner of said village to the south line of the town of Jamaica, as it existed on the thirty-first day of December, eighteen hundred and ninety-seven, are hereby annexed to, united and consolidated with the municipal corporation known as the mayor, aldermen and commonalty of the city of New York, to be hereafter called, "The City of New York;" and the

boundaries, jurisdictions and powers of the said city of New York herein constituted, are for all purposes of local administration and government, hereby declared to be co-extensive with the territory above described; and the said city of New York is hereby declared to be the successor corporation in law and in fact of all the municipal and public corporations united and consolidated as aforesaid, with all their lawful rights and powers, and subject to all their lawful obligations, without diminution or enlargement except as herein otherwise specially provided; and all of the duties and powers of the several municipal and public corporations united and consolidated as aforesaid into The City of New York are hereby devolved upon the board of aldermen of the said city of New York, so far as the same are applicable to said city, and not herein otherwise specially provided, to be exercised in accordance with the provisions of this act. This act may be cited by the short title of "The Greater New York Charter."

Notes to Charter section 1.

For boundaries of the city and county of New York, see Laws 1882, chap. 410, § 1; Laws 1885, chap. 469, and Laws 1895, chap. 934.

Kings and Richmond. Laws 1788, chap. 64.

Towns of Newtown, Flushing, Jamaica, and Hempstead. Laws 1788, chap. 64. By Laws 1899, chap. 379, a part of the former town of Hempstead was excluded from the city and included in the present town in the county of Nassau.

Long Island City was formerly a part of the town of Newtown. Laws 1871, chap. 461.

Division into boroughs.

CHARTER, § 2. The City of New York, as constituted by this act, is hereby divided into five bor-

oughs to be designated respectively: Manhattan, The Bronx, Brooklyn, Queens and Richmond; the boundaries whereof shall be as follows:

1. The borough of Manhattan shall consist of all that portion of The City of New York, as hereby constituted, known as Manhattan Island, Nuttin or Governor's Island, Bedloe's Island, Bucking or Ellis Island, the Oyster Islands, and also Blackwell's Island, Randall's Island and Ward's Island, in the East or Harlem rivers.

2. The borough of The Bronx shall consist of all that portion of The City of New York as hereby constituted, lying northerly or easterly of the borough of Manhattan, between the Hudson river and the East river or Long Island Sound, including the several islands belonging to the municipal corporation heretofore known as the mayor, aldermen and commonalty of the city of New York, not included in the borough of Manhattan.

3. The borough of Brooklyn shall consist of that portion of The City of New York, as hereby constituted, hitherto known as the city of Brooklyn.

4. The borough of Queens shall consist of the territory known as Queens county.

5. The borough of Richmond shall consist of the territory known as Richmond county.

Notes to Charter section 2.

Section 1 of this act states the constituent territorial parts of each borough.

By section 1358 of said act each of these boroughs are divided into districts, and section 1359, to and including section 1363 state the territory and wards embraced within, and comprising each district.

By Laws 1899, chap. 379, certain territory was excluded from the Greater New York city and was annexed to the town of Hempstead in the county of Nassau.

Name; powers and rights of the corporation; seal.

CHARTER, § 3. The name of the corporation constituted by this act shall be "The City of New York," and the same shall by that name, be a body politic and corporate in fact and in law with power to contract and to be contracted with, to sue and be sued, to have a common seal and to have perpetual succession, with all of the rights, properties, interests, claims, demands, grants, powers, privileges and jurisdictions held by the mayor, aldermen and commonalty of the city of New York, and held by each of the municipal and public corporations or parts thereof, other than counties, by this act united and consolidated with the corporation known as the mayor, aldermen and commonalty of the city of New York, except so far as modified or repealed by the provisions of this act.

CHAPTER XX.

INFERIOR LOCAL COURTS.

Title 2. The Municipal Court of the City of New York.
5. Interpreters.

TITLE 2.

The Municipal Court of the City of New York.

§ 1350. Courts, etc., abolished.
1351. Municipal court created.
1352. Justices.
1353. Qualifications, etc., of justices.
1354. Oath.
1355. Salary.
1356. Terms.
1357. Vacancies.
1358. Districts.
1359. Borough of The Bronx.

§ 1360. Borough of Manhattan.
1361. Borough of Brooklyn.
1362. Borough of Queens.
1363. Borough of Richmond.

Courts, etc., abolished.

CHARTER, § 1350. From and after midnight of the thirty-first day of January, eighteen hundred and ninety-eight, the justices' courts and the office of justice of the peace in the cities of Brooklyn and Long Island City are abolished, and all jurisdiction, power, authority and duty theretofore vested in said courts and justices of the peace, and in the clerks, officers, interpreters, stenographers and employes of said courts and justices shall cease and determine, except as provided in the next section and section thirteen hundred and seventy-two of this act; and from and after the passage of this act no person shall be elected to the office of district court justice or justice of the peace in any portion of the territory included within The City of New York as constituted by this act.

Note to Charter section 1350.

Section 1372, mentioned in this section, had reference to seals and was repealed by "The Municipal Court Act of The City of New York" (Laws 1902, chap. 580, § 364). It is now contained in section 18 of said Municipal Court Act, so cited by section 365 thereof.

Municipal court created.

CHARTER, § 1351. On and after the first day of January, eighteen hundred and ninety eight, the district courts of the city of New York and the justices' courts of the first, second and third districts of the city of Brooklyn are hereby continued, consolidated

and reorganized under the name of "The Municipal Court of The City of New York," which said court shall be a local civil court within The City of New York as constituted by this act, and shall not be a court of record or have any equity jurisdiction; but shall have the jurisdiction, powers, duties and organization hereinafter prescribed.

Notes to Charter section 1351.

Not a new court.— When this section went into effect under "The Greater New York Charter" (Laws 1897, chap. 378), many conflicting decisions followed whether this section did or did not create a new local inferior court contrary to the Constitution of the State, but the question was finally settled by the Court of Appeals in *Worthington* v. *London G. & A. Co.*, 164 N. Y. 81, deciding that "The Municipal Court of The City of New York as created by 'The Greater New York Charter' (Laws 1897, chap. 378, § 1351) is not a *new* court, but a *continuation, consolidation, and reorganization* of the former District Courts of the old city of New York, and the justices' courts in the first, second, and third districts of the old city of Brooklyn, under a *new* name." See also *Menthen* v. *Eyelis*, 23 Misc. 98; *Advertising* v. *Boston Dental Assn.*, 23 Misc. 663; *Stuber* v. *Coler*, 164 N. Y. 24.

This court forms a part of the judicial system of the State. Const., art. 6, § 18; *Hartman* v. *The Mayor*, 51 How. Pr. 351; *Quin* v. *The Mayor*, 44 How. Pr. 266, affd., 53 N. Y. 627; *People ex rel. Phelps* v. *General Sessions*, 13 Hun, 397, followed in 19 Hun, 84, 86.

Constitutionality.— The statute establishing the Municipal Court of The City of New York,— held constitutional. *Irwin* v. *Metropolitan St. Ry.*, 38 App. Div. 253, 57 N. Y. Supp. 21, affg. 54 N. Y. Supp. 195; *Worthington* v. *London, etc.*, 164 N. Y. 81.

The organization of this court is not unconstitutional, because the justices are elected in specified districts in the city and exercise their functions in various other districts, as it is governed by section 17, article 6 of the Constitution of 1894. *People* v. *Dooley*, 69 App. Div. 512.

Justices.

CHARTER, § 1352. The said court shall be held by justices to be elected or appointed, as follows:

1. The justices of said district courts of The City of New York and said justices of the peace in the first,

second and third districts of the city of Brooklyn, in office on the first day of January, eighteen hundred and ninety-eight, shall continue for the remainder of the terms for which they were elected or appointed, and shall be called justices of the municipal court of The City of New York, and shall have all the powers and jurisdiction and be subject to all the duties and requirements hereinafter prescribed for justices of said municipal courts.*

Election of successors.

2. The successors of the justices mentioned in the first subdivision of this section shall be elected by the electors of the districts for which said justices were elected or appointed respectively, as described and renumbered in sections thirteen hundred and fifty-nine, thirteen hundred and sixty and thirteen hundred and sixty-one of this act, at the general election to be held in the year at the end of which the terms of said justices shall expire.

Id.; when terms expire in 1897.

3. There shall be elected at the general election to be held on the first Tuesday succeeding the first Monday of November, in the year eighteen hundred and ninety-seven as many justices of said municipal court as there shall be justices of the said district courts in the city of New York or justices of the peace of the said first, second and third districts, in the city of Brooklyn, whose terms expire at the end of year

* So in original of charter of 1897, as amended in 1901, should be "court."

eighteen hundred and ninety-seven. Such justices shall be elected by the electors of the districts for which such justices whose terms expire in eighteen hundred and ninety-seven were elected or appointed, as described and renumbered in sections thirteen hundred and fifty-nine, thirteen hundred and sixty and thirteen hundred and sixty-one of this act.

Additional justices.

4. On or before the twentieth day of January, eighteen hundred and ninety-eight, the mayor of The City of New York shall appoint seven additional justices of said municipal court, two of whom shall be residents of the fourth and fifth districts of the borough of Brooklyn, three of whom shall be residents of the first, second and third districts of the borough of Queens, and two of whom shall be residents of the first and second districts of the borough of Richmond, respectively. The justices so appointed shall hold office till the thirty-first day of December, eighteen hundred and ninety-nine, and their successors shall be elected at the general election to be held in the year eighteen hundred and ninety-nine, and shall be residents of the same districts as the justices appointed pursuant to this subdivision.

Notes to Charter section 1352.

Not a city officer.— A civil justice in The City of New York is not an officer or employee of the city government, under section 95, of chapter 335, Laws of 1873. §§ 95 or 97 (being the city charter); *Hartman* v. *Mayor*, 51 How. Pr. 351; *Quinn* v. *Mayor*, 44 How. Pr. 266; affd., 53 N. Y. 627; *People ex rel. Phelps* v. *General Sessions*, 13 Hun, 397, followed in 19 Hun, 84, 86.

Election held invalid.— An act of the Legislature (Laws 1866, chap. 217, § 1), appointing a different time for the election of justice from that prescribed by the act creating the office (Laws 1860, chap. 300), repealed so much of the latter act, and an election under it was invalid. *The People ex rel. Fowler* v. *Bull*, 46 N. Y. 57.

Continuance in office.— This section provides that the justices, in office on January 1, 1898, shall continue for the remainder of their terms and shall be called justices of the Municipal Court. *The Railway Advertising Co.* v. *The Boston Dental Association*, 23 Misc. Rep. 663.

Duties, liability, and powers of a justice.— Under title I of this act the jurisdiction and general powers *of the court* are specified and such powers as are expressed in subdivisions 15 and 19 of section 1 of that title which formerly were performed by the justice are now done by the court. See also note to § 1, "Jurisdiction," and §§ 15, 19, and notes. There are many incidental duties and powers of the justices, and their liability in damages for their acts, which must be noted under this section of the charter as we know of no other more appropriate place. See also §§ 10 to 20.

Altering docket after time limited to render judgment was held void in *Dauchy* v. *Brown*, 41 Barb. 555.

Arrest, judgment for.— It is the duty of the justice to state in the judgment that the defendant is subject to arrest in a proper case. *Carpentier* v. *Willett*, 31 N. Y. 90; s. c., 1 Keyes, 510.

Conversion; boarding-house keeper's lien; judgment.— An action to enforce a boarding-house keeper's lien upon property of a boarder which he has clandestinely removed is one for conversion of personal property within the meaning of subdivision 2 of section 2895 of the Code, and the justice is bound to insert in the judgment the liability of the defendant to arrest upon execution. *Babcock* v. *Smith*, 47 N. Y. St. Rep. 118; s. c., 19 N. Y. Supp. 817.

Jury trial, may direct.— A justice has power, within eight days (now fourteen days) after the conclusion of a trial before him, to direct a trial by jury. *Lemier* v. *Stearns*, 15 Misc. Rep. 7.

Where a judgment has been reversed and a new trial ordered, the justice has power, on the second trial, to direct that the trial be had by jury. *New York Small Stock Co.* v. *The Third Ave. R. R. Co.*, 16 Misc. Rep. 64.

Interest, relationship of counsel.— He cannot act in any case where he has an interest (11 Johns. 76); or bears relationship to parties (17 Johns. 133 13 Johns. 191; 12 How. Pr. 367; 19 Johns. 172); or had been counsel (12 Abb. Pr. 348).

Keeping court open and trial on Sunday.— See notes to § 17.

Marriages.— The justices may solemnize marriages. Laws 1889, chap. 415, subd. 3, and Laws 1896, chap. 272, p. 217.

Penalty, action for a.— Justice to fix amount of penalty where the law does not fix it in actions by department of health, and the amount to be not less than $20. Charter, § 1262.

Relationship of justice to any of the parties renders the judgment illegal and void. *Chapin* v. *Churchill*, 12 How. Pr. 367; *Baldwin* v. *McArthur*, 17 Barb. 415.

Term of office, finishing trial and return to writs after.— See notes to § 16.

Transcript of proceedings, etc.— The justice may give a transcript of any proceedings had before him or any other paper filed with him, or of the minutes of any testimony taken by, or before him, certified by him to be correct, and shall be presumptive evidence of the facts therein contained. § 15.

Volunteering.— It is not proper for the justice to volunteer to make amendments not moved for by either party. *Lloyd* v. *Fox*, 1 E. D. Smith, 101; *Enright* v. *Seymour*, 8 N. Y. St. Rep. 356.

Liability of the justice.— The justice must act in strict conformity with the statutes, and if he exceeds these powers his proceedings are absolutely void, and he is liable for damages. *Low* v. *Rice*, 8 Johns. 409; *Clyde & Rose Plank Road Co.* v. *Parker*, 22 Barb. 323; *Vosburgh* v. *Welch*, 11 Johns. 174; *Kerr* v. *Mount*, 28 N. Y. 659; *Van Low* v. *King*, 3 Cowen, 375.

Delaying entry of judgment.— Where the justice, upon the return day of the summons, having the summons, verified complaint, and due proof of service upon the defendant before him, and no answer being filed by defendant, refused to give judgment for the plaintiff as required by sections 3126, 3207 of the Code, but adjourned the case for three days, and then entered judgment for the plaintiff, and the plaintiff commenced suit against the justice, setting up in his complaint the above facts, and alleging that by reason of the failure of the justice to enter judgment for three days, other creditors, in the interim, had levied upon the property of the defendants in the action, and the plaintiff had lost his debt. *Held*, that the justice did not exceed his jurisdiction in adjourning the case for three days, without summarily entering judgment. *Merwin et al.* v. *Rogers*, 24 N. Y. St. Rep. 496.

An action for damages at the suit of an individual is not maintainable against a justice, because of his failure to render judgment in an action tried before him within four days after its final submission.

As to whether, where it appears that the justice in fact decided the case but omitted to enter it in his docket within the four days, he would be liable, *quære*. *Everts* v. *Kichl*, 102 N. Y. 296.

Error of judgment.— Although this court is a court of limited jurisdiction, yet where the justice's act is an error of judgment, it does not subject him to suit, but he is entitled to protection afforded to a judge of a court of record. *Merwin* v. *Rogers*, 24 N. Y. St. Rep. 496.

See also *Austin* v. *Vrooman*, 40 N. Y. St. Rep. 338; *Fischer* v. *Langbein*, 103 N. Y. 84; *Handshaw* v. *Arthur*, 9 App. Div. 175.

Erroneous, irregular, or void process.— For the differences between void and irregular or erroneous process and the liability of courts and attorneys, see the very able opinion by the deceased Chief Justice Ruger, in the case of *Fischer* v. *Langbein*, 103 N. Y. 84. See also *Farrington* v. *Root*, 10 Misc. Rep. 347.

Exceeding his power.— Justice is liable, therefore, in damages. Cowen's Treatise, vol. 1, §§ 17, 20, 665, 667, 680, 684, 695, 697, 698, 804, 847; 11 Johns. 44, 177; 28 N. Y. 659; 15 Johns. 152; 10 Wend. 420; 4 Den. 118.

He is not liable for errors committed in the exercise of his powers or authority, where he has jurisdiction of the person or subject-matter. Jurisdiction being established, the court may proceed to almost any length in the exercise of its judicial functions, without incurring any liability. 4 Den. 120; 11 N. Y. (1 Kern.) 573; 19 Barb. 283; 38 Barb. 339; Cowen's Treatise, §§ 17, 18, 660, 662, 684, 697, 698, 830, 1247, 1563.

A well-considered discussion of the grounds and limits of exemption from liability for judicial acts will be found in the opinion of Justice Brewer in *Cook* v. *Bangs*, 24 N. Y. St. Rep. 545, where plaintiff sued a justice of the peace who had committed him for contempt and, the commitment having been in excess of the justice's jurisdiction, claimed that the action could be sustained on an allegation of malice. The court held that in the case of a justice of the peace, as well as in that of a justice of a Superior Court, transcending the limits of an actual jurisdiction is not actionable, although the assumption of a jurisdiction wholly nonexistent may be. See also *Fischer* v. *Langbein*, 103 N. Y. 84; *Handshaw* v. *Arthur*, 9 App. Div. 175.

False return.— A justice acts ministerially, and is liable for a false return for any damages which a party may sustain. *McDonnell* v. *Buffum*, 31 How. Pr. 154; *Houghton* v. *Swartout*, 1 Den. 589; *Tompkins* v. *Sands*, 8 Wend. 462; *Cunningham* v. *Bucklin*, 8 Cow. 178; *Scott* v. *Rushman*, 1 Cow. 202.

Upon appeal from a judgment, the appellate court cannot consider affidavits submitted for the purpose of contradicting the justice's return. The court is governed by the return, and if it is untrue, the remedy is by action against the justice for a false return. *Fitzsimmons* v. *Baxter*, 3 Daly, 82.

Misdemeanor.— In *Newberger* v. *Campbell*, 58 How. 313, it was held that the justice is liable for a misdemeanor, and that the judgment is void, if it was obtained by a person not a party, or an attorney. s. c., 9 Daly, 102; *Kaplan* v. *Berman*, 37 Misc. Rep. 502.

Permitting person not an attorney to practice.— Where a judge knowingly permits to practice in his court a person not regularly admitted to practice, his judgment rendered in a cause so conducted in

violation of law is void and will be reversed. *Newburger* v. *Campbell*, 58 How. 313; s. c., 9 Daly, 102; *Kaplan* v. *Berman*, 37 Misc. Rep. 502.

Qualifications, etc., of justices.

CHARTER, § 1353. No one shall hereafter be eligible to the office of justice of the said municipal court, after the first day of March, eighteen hundred and ninety-nine, unless he be a resident and elector in the district for which he shall be elected or appointed and has been an attorney and counsellor-at-law of the state of New York for at least five years or unless he shall have served as a justice of such municipal court. None of said justices shall engage in any other business, profession, or hold any other public office or act as referee or receiver, but each of such justices shall devote his whole time and capacity, so far as the public interest demands, to the duties of his office; provided, however, that this restriction shall not apply to the justices of said court mentioned in subdivision one of section thirteen hundred and fifty-two of this act.

Notes to Charter section 1353.

This section supersedes section 1282 of the Consolidation Act, which was originally derived from Laws 1857, chap. 344, § 5, and Laws 1899, chap. 254, p. 454.

Attorney.— Justice may act as attorney in his own case. *Libby* v. *Rosekrans*, 55 Barb. 202.

Disqualification of justice; death or removal of justice not to impair proceedings.— See § 16.

No fees.— No judicial officer, except justices of the peace, shall receive to his own use any fees or perquisites of office. Const. of 1894, art. VI, § 20.

A judge or other judicial officer shall not demand or receive a fee or other compensation for giving his advice in a matter or thing pending before him, or which he has reason to believe will be brought before him for decision; or for preparing a paper or other proceeding relating to such a matter or thing; except a justice of the peace, in a case

where a fee is expressly allowed to him by law. Code Civ. Proc., § 51; *McLarren* v. *Charrier*, 5 Paige, 530.

Witness; proceedings in case justice is a.—See § 60. The justice must be both a material and necessary witness, which must be shown by facts, and the justice is to judge of the sufficiency of the affidavit. *Young* v. *Scott*, 3 Hill, 32; *Martha* v. *Walters*, 2 Sandf. 517; *Board of Excise, etc.* v. *Doherty*, 16 How. Pr. 46.

When the cause was called for trial defendant presented an affidavit showing that the judge was a material witness, without whose testimony the defendant could not safely proceed to trial, and moved that the trial might be had before another judge. The motion was denied on the ground that the judge, as he then stated, "could give no evidence of anything except what appeared on his minutes." *Held*, the cause should have been tried by another judge; that the right of the defendant to have the evidence of the judge ought not to have been defeated. *Brown* v. *Brown*, 2 E. D. Smith, 154; *Hopkins* v. *Calray*, 24 Wend. 264.

For proceedings where the justice is a material witness, see also Cowen's Treatise, §§ 981 to 984.

Oath.

CHARTER, § 1354. The justices elected or appointed pursuant to this act shall, before entering upon their duties, take the oath of office prescribed by the constitution, and file the same with the city clerk.

Salary.

CHARTER, § 1355. The salary of each of said justices, except those appointed or elected from the boroughs of Queens and Richmond, shall be six thousand dollars a year, to be paid in equal monthly instalments by the proper officers of said city, and the salary of each of said justices appointed or elected for the boroughs of Queens and Richmond shall be five thousand dollars a year, to be paid in the same manner.

Notes to Charter section 1355.

This section supersedes section 1283 of the Consolidation Act (Laws 1882, chap. 410).

In *Goetting* v. *City of New York*, 29 Misc. Rep. 717, 61 N. Y. Supp. 334, it was decided that a justice of this court in the borough of Brooklyn, duly appointed January 4, 1898, was entitled to his salary for that month, though the justices' courts as they had existed were continued under the Charter until February 1, 1898. The late lamented Justice David McAdam, at Trial Term, in deciding in favor of the justice, said: "Such a result as contended for by the city could only follow the mistaken notion that a fixed salary belonging to a judicial office must be earned by the incumbent before it is recoverable by him. Such a salary is not measured by the duties the official actually performs, or is called upon to perform, and is recoverable without regard to the labors imposed, or the manner of their performance. Section 1374 of the Charter, providing that after the 1st of January, 1898, the municipal justices were to become a board of justices, to elect a president, and establish rules, showed that whatever duties were connected with the organization of the board, devolved upon the plaintiff and his associates during January, and these duties were performed by them. There is no variation in official salaries on account of light or heavy work, or the total absence of work, a feature that may perhaps have attracted some to official life and led to the repeated use of that much abused term 'sinecure.'"

No fees or perquisites of office to his own use. Const., art. VI, § 21. And see Code Civ. Proc., § 51; *McLarren* v. *Charrier*, 5 Paige, 530.

Execution or supplementary proceedings.— The salary of justice cannot be taken on execution or in supplementary proceedings while in the hands of the disbursing officer. *Remmey* v. *Gedney* and *Kilpatrick* v. *Gedney*, City Court Reports, vol. 1, p. 28, Marine Court, Special Term, June 19, 1876.

Terms.

CHARTER, § 1356. The terms of said justices to be elected pursuant to this title shall be ten years.

Notes to Charter section 1356.

This section supersedes section 1281, Consolidation Act (Laws 1882, chap. 410).

Extending term invalid.— An act of the legislature extending the term of a District Court justice is unconstitutional. *People ex rel. Fowler* v. *Bull*, 46 N. Y. 57, distinguishing *People* v. *Batchellor*, 22 N. Y. 138.

Vacancies.

CHARTER, § 1357. Vacancies occurring in the office of justice of said court shall be filled at the next ensuing general election for the unexpired term commencing on the first day of January next after said election; and the mayor of the city shall appoint some proper person to fill such vacancy in the interim within twenty days after the same occurs.

Note to Charter section 1357.

This section supersedes section 1281, Consolidation Act (Laws 1882, chap. 410).

Districts.

CHARTER, § 1358. The several boroughs composing The City of New York are hereby divided into districts, in each of which sessions of said municipal court shall be held, as specified in the next five sections.

Note to Charter section 1358.

This section supersedes section 1280, Consolidation Act (Laws 1882, chap. 410).

Borough of The Bronx.

CHARTER, § 1359. In the borough of The Bronx there shall be two districts, as follow:

1. The first district embracing the territory described in chapter nine hundred and thirty-four of the laws of eighteen hundred and ninety-five.

Notes to Charter section 1359, subdivision 1.

Districts.— The territory embraced within the first judicial district, borough of The Bronx, remains, notwithstanding its annexation to the city and county of New York, part of the second judicial district and department, and an appeal does not lie from this court therein, to the

Appellate Term, but to the Appellate Division of the Second Department. *Duckworth* v. *Cunningham*, 26 Misc. Rep. 403, 56 N. Y. Supp. 191; *McTurck* v. *Froussadier*, 51 App. Div. 218, 64 N. Y. Supp. 962.

First district boundary.—"All that territory comprised within the limits of the towns of Westchester, Eastchester, and Pelham, which has not been annexed to the city and county of New York at the time of the passage of this act, which lies southerly of a straight line drawn from the point where the northerly line of the city of New York meets the center line of the Bronx river, to the middle of the channel between Hunter's and Glen Islands, in Long Island Sound, and all that territory lying within the incorporated limits of the village of Wakefield which lies northerly of said line, with the inhabitants and estates therein, is hereby set off from the county of Westchester and annexed to, merged in and made part of the city and county of New York, and of the Twenty-fourth ward of said city and county, and shall hereafter constitute a part of the city and county of New York, and of the Twenty-fourth ward of said city and county." Laws 1895, chap. 934, § 1.

2. The second district embracing the remainder of said borough.

Notes to Charter section 1359, subdivision 2.

This section supersedes section 1280, subdivision 10 of the Consolidation Act (Laws 1882, chap. 410).

Second district boundary.— This district, being the remainder of said borough, comprises the Twenty-third and Twenty-fourth wards, which were created out of portions of Westchester county and added to New York county by Laws 1873, chapter 613. By this act the town of Morrisania was made the Twenty-third ward, and the towns of West Farms and Kingsbridge the Twenty-fourth ward of the city of New York.

The Consolidation Act (Laws 1882, chap. 410), §§ 24 and 25, bounds these wards as follows:

TWENTY-THIRD WARD. § 24. The Twenty-third ward shall include all that territory which lies east and north of Harlem river and south of a line beginning at a point on the southerly side of the High bridge across the Harlem river; thence running easterly on a straight line to a point on Mill brook, directly opposite to the line formerly dividing central Morrisania from lower Morrisania, being the former northerly line of lower Morrisania; thence easterly along said last-mentioned line to a point one hundred and forty feet east of Franklin avenue, and thence on a line produced eastwardly by the extension of the middle of the main channel of the Bronx river of that portion of said last-

mentioned line which lies between the Third avenue and said point in said line, one hundred and forty feet east of Franklin avenue, said territory being the whole of the former town of Morrisania, and a portion of the former town of West Farms. It shall also include North Brothers Island.

TWENTY-FOURTH WARD. § 25. The Twenty-fourth ward shall embrace all that territory lying north of the Twenty-third ward and south of the north boundary of the city, comprising the territory embraced in the former town of Kingsbridge, and in that portion of the former town of West Farms not included in the Twenty-third ward.

The territory comprising the First Judicial district of the borough of The Bronx was added to the Twenty-fourth ward by Laws of 1895, chapter 934, section 1, and together with the above boundary (§ 25 of the Consolidation Act) comprises the whole of the present Twenty-fourth ward.

By section 1578 of "The Greater New York Charter," these wards were continued and designated as follows:

Wards in boroughs of Manhattan and The Bronx; how designated.— The wards of the corporation heretofore known as the mayor, aldermen, and commonalty of the city of New York are hereby continued, with their present boundaries and numbers, and shall be known and designated as wards of the boroughs of Manhattan and The Bronx, respectively. Laws 1901, chap. 466, § 1578.

Power to change boundaries.— The board of aldermen may from time to time by ordinance change the boundaries of wards and create other wards as the public good and convenience may require. Laws 1901, chap. 466, § 1582.

Borough of Manhattan.

CHARTER, § 1360. In the borough of Manhattan there shall be eleven districts, as follows:

1. The first district embraces the third, fifth and eighth wards of said borough of Manhattan, and all that part of the first ward lying west of Broadway and Whitehall street, including Nutten or Governors Island, Bedloes Island, Bucking or Ellis Island and the Oyster Islands.

Notes to Charter section 1360, subdivision 1.

This section, with its eleven subdivisions, supersedes section 1280 of the Consolidation Act (Laws 1882, chap. 410, and 1884, chap. 286).

These wards, and the wards enumerated in the following ten subdivisions of section 1360, making up the various districts, are bounded and described by the Consolidation Act (Laws 1882, chap. 410), § 2, to and including § 23. We have already seen that by the Charter, § 1578, these wards were continued and designated as wards of the borough of Manhattan (see note to § 1359, subd. 2), and that by section 1582 of said Charter the board of aldermen may change the boundaries of, and create other wards.

THIRD WARD. § 4. The Third ward shall begin on the west side of Hudson river, at the northwesterly corner of the First ward, and running thence due east to the middle of Liberty street; then through the middle of Liberty street to the middle of Broadway; then through the middle of Broadway to a point opposite to the middle of Reade street; then through the middle of Reade street, in a line running in the same direction across Hudson river, to low-water mark, on the west side thereof, or so far as the bounds of the State extend; then down the west side of Hudson river, at low-water mark, or along the limits of this State, to the place of beginning.

FIFTH WARD. § 6. The fifth ward shall begin at the northwesterly corner of the Third ward, and run thence along the northerly bounds thereof to the middle of Broadway; then through the middle of Broadway to the middle of Canal street; then through the middle of Canal street to Hudson river; then due west to low-water mark, on the west side of Hudson river, or so far as the bounds of this State extend; then down along the west side of Hudson river, at low-water mark, or along the limits of this State, to the place of beginning.

EIGHTH WARD. § 9. The Eighth ward shall begin at the northwesterly corner of the Fifth ward, and run thence along the northerly bounds of the said ward through Canal street to the middle of Broadway; then through the middle of Broadway to a point opposite to the middle of Houston street; then through the middle of Houston street to a point opposite to the middle of West Houston street; then through the middle of West Houston street to Hudson river; then due west to low-water mark, on the west side of Hudson river, or so far as the limits of this State extend; then down along the west side of Hudson river, at low-water mark, or along the limits of this State, to the place of beginning.

FIRST WARD. The First ward shall begin in the middle of Broadway, at a point where it is intersected by the middle of Liberty street, and run from the said point of intersection, through the middle of Liberty street, southeasterly, to the middle of Maiden Lane; then down the middle of Maiden Lane, and from thence in a straight line running in the same direction across the East river, to low-water mark on Nassau or Long Island; and thence along Nassau or Long Island shore, at low-water mark, to the south side of Red Hook; and then across

Hudson river, so as to include Nutten or Governor's Island, Bedlow's Island, Bucking or Ellis Island, and the Oyster Islands, and all the waters of this State in the bay of New York, and to the southward thereof, and which are not comprehended in any other county, to low-water mark on the west side of Hudson river, or so far as the bounds of this State extend; then up along the west side of Hudson river, at low-water mark or along the limits of this State, to a place due west from the middle of the west end of Liberty street; then to the middle of Liberty street; then through the middle of Liberty street to the middle of Broadway, at the place of beginning.

2. The second* embraces the second, fourth, sixth and fourteenth wards, and all that portion of the first ward lying south and east of Broadway and Whitehall street.

Notes to Charter section 1360, subdivision 2.

SECOND WARD. § 3. The Second ward shall begin at the southeasterly corner of the First ward, and run thence along the easterly bounds thereof, across the East river to the middle of Broadway; then up the middle of Broadway to a point opposite the middle of Park row; then through the middle of Park row to a point opposite to the middle of Spruce (formerly George) street; then down the middle of Spruce street to the middle of Gold street; then through the middle of Gold street to a point opposite to the middle of Ferry street; then through the middle of Ferry street, in a line running in the same direction across the East river to Nassau or Long Island, to low-water mark; then along Nassau or Long Island, at low water, to the place of beginning.

FOURTH WARD. § 5. The Fourth ward shall begin at the northerly corner of the Second ward, and run thence through the middle of Chatham street, to a point opposite to the middle of Catharine street; and thence through the middle of Catharine street, in a line running in the same direction across the East river, to low-water mark, on Nassau or Long Island; then along Nassau or Long Island shore, at low-water mark, to the bounds of the Second ward; and then northwesterly along the bounds of the Second ward, to the place of beginning.

SIXTH WARD. § 7. The Sixth ward shall begin at a point in the middle of Broadway, where it is intersected by the middle of Canal street, and run thence through the middle of Canal street to where it

*The word "district" is omitted. It is so in the official copy of the act.

is intersected by the middle of Centre street; then through the middle of Centre street to the middle of Walker street; then through the middle of Walker and Canal streets to the middle of the Bowery road; then through the middle of the Bowery road to the middle of Chatham street; then through the middle of Chatham street and Park row to the middle of Broadway, and then through the middle of Broadway to the place of beginning.

FOURTEENTH WARD. § 15. The Fourteenth ward shall begin at a point in the middle of the Bowery road, where it is intersected by the middle of Walker street; then through the middle of the Bowery road to a point opposite the middle of Houston street; then through the middle of Houston street to where it is intersected by the middle of Broadway; thence through the middle of Broadway to where it is intersected by the middle of Canal street; and then through the middle of Canal, Centre, and Walker streets, being along the northerly bounds of the Sixth ward, to the place of beginning.

That part of the First ward included in this district will be found in the description of that ward under the notes to Charter section 1360, subdivision 1.

3. The third district embraces the ninth and fifteenth wards.

Notes to Charter section 1360, subdivision 3.

NINTH WARD. § 10. The Ninth ward shall begin at the northwesterly corner of the Eighth ward, and run thence along the northerly bounds of the said ward through the middle of West Houston street to the middle of Hancock street; thence northerly through the middle of Hancock street to the middle of Bleecker street; thence northwesterly through the middle of Bleecker street to the middle of Carmine street; thence northeasterly through the middle of Carmine street to the middle of Sixth avenue; thence northerly through the middle of Sixth avenue to the middle of West Fourteenth street; thence westerly through the middle of West Fourteenth street to Hudson river; then due west to low-water mark on the west side of Hudson river; or so far as the limits of this State extend; then down along the west side of Hudson river, at low-water mark, or along the limits of this State, to the place of beginning.

FIFTEENTH WARD. § 16. The Fifteenth ward shall begin at a point in the middle of Fourteenth street where the middle of Sixth avenue intersects the middle of Fourteenth street, and runs thence southerly through the middle of Sixth avenue to the middle of Carmine street; thence southwesterly through the middle of Carmine street to the middle of Bleecker street; thence southeasterly through the middle of Bleecker

street to the middle of Hancock street; thence southerly through the middle of Hancock street to the middle of Houston street; thence easterly through the middle of Houston street to the middle of the Bowery road; thence northerly along the middle of the Bowery road and the middle of Fourth avenue to the middle of Fourteenth street, and thence westerly along the middle of Fourteenth street, to the place of beginning.

4. The fourth district embraces the tenth and seventeenth wards.

Notes to Charter section 1360, subdivision 4.

TENTH WARD. § 11. The Tenth ward shall begin at a point in the middle of the Bowery road, opposite to the middle of Division street; then through the middle of Division street to the middle of Norfolk street; then through the middle of Norfolk street to the middle of Rivington street; then through the middle of Rivington street to the middle of the Bowery road; then through the middle of the Bowery road to the place of beginning.

SEVENTEENTH WARD. § 18. The Seventeenth ward shall begin at a point formed by the interseetion of the middle of Fourteenth street with the middle of Avenue B, and run thence southerly along the middle of Avenue B to Houston street; thence across Houston street to the middle of Clinton street; thence through the middle of Clinton street to middle of Rivington street; thence westerly through the middle of Rivington street to the middle of the Bowery road; thenee northerly along the middle of the Bowery road and Fourth avenue to the middle of Fourteenth street; and thence easterly along the middle of Fourteenth street to the place of beginning.

5. The fifth district embraces the seventh, eleventh and thirteenth wards.

Notes to Charter section 1360, subdivision 5.

SEVENTH WARD. § 8. The Seventh ward shall begin at the southeasterly corner of the Fourth ward, and run thence along the easterly boundary of the Fourth ward to the middle of Division street; then through the middle of Division street to the middle of Grand street; then through the middle of Grand street, in a line running in the same direction across the East river, to low-water mark on Nassau or Long Island; then along Nassau or Long Island shore, at low-water mark, to the place of beginning.

ELEVENTH WARD. § 12. The Eleventh ward shall begin at a point in the middle of Rivington street, where Clinton street intersects Rivington street; and run thence through the middle of Clinton street to the middle of Avenue B, and then northerly through the middle of Avenue B to the middle of Fourteenth street; thence easterly through the middle of East Fourteenth street to the East river, and thence running across the East river to low-water mark on Long Island; then along Long Island shore, at low-water mark, to a point, opposite the middle of the easterly end of Rivington street; then in a direct line across the East river through the middle of Rivington street, to the place of beginning.

THIRTEENTH WARD. § 14. The Thirteenth ward shall begin at the northeasterly corner of the Seventh ward, and thence along the easterly and northerly line of the said ward through the middle of Grand and Division streets, to the middle of Norfolk street; thence through the middle of Norfolk street to where it is intersected by the middle of Rivington street; then through the middle of Rivington street in a line running in the same direction across the East river, to low-water mark on Nassau Island; and then along the shore of said island, at low-water mark, to the place of beginning.

6. The sixth district embraces the eighteenth and twenty-first wards.

Notes to Charter section 1360, subdivision 6.

EIGHTEENTH WARD. § 19. The Eighteenth ward shall begin at a point formed by the intersection of the middle of Fourteenth street with the middle of Sixth avenue, and run thence northerly along the middle of Sixth avenue to the middle of Twenty-sixth street; thence easterly along the middle of Twenty-sixth street in a line running in the same direction across the East river to low-water mark on Long Island; thence along Long Island shore, at low-water mark, to a point opposite the middle of the easterly end of Fourteenth street; and thence in a direct line across the East river through the middle of Fourteenth street, to the place of beginning.

TWENTY-FIRST WARD. § 22. The Twenty-first ward shall begin at a point formed by the intersection of the middle of Twenty-sixth street with the middle of Sixth avenue, and run thence northerly along the middle of Sixth avenue to the middle of Fortieth street; thence easterly along the middle of Fortieth street, in a line running in the same direction across the East river, to low-water mark on Long Island; thence along Long Island shore, at low-water mark, to a point opposite the middle of the easterly end of Twenty-sixth street, and thence in a direct line across the East river, through the middle of Twenty-sixth street, to the place of beginning.

7. The seventh district embraces the nineteenth ward.

Note to Charter section 1360, subdivision 7.

NINETEENTH WARD. § 20. The Nineteenth ward shall begin at a point formed by the intersection of the middle of Fortieth street with the middle of Sixth avenue, and run thence northerly along the middle of Sixth avenue to the center of Fifty-ninth street; thence in a line running in the same direction across Central park to the middle of Eighty-sixth street; thence easterly along the middle of Eighty-sixth street in a line running in the same direction across the East river to low-water mark on Long Island; thence along Long Island shore, at low-water mark, to a point opposite the middle of the easterly end of Fortieth street; and thence in a direct line across the East river along the middle of Fortieth street to the place of beginning.

8. The eighth district embraces the sixteenth and twentieth wards.

Notes to Charter section 1360, subdivision 8.

SIXTEENTH WARD. § 17. The Sixteenth ward shall begin at the northwesterly corner of the Fifteenth ward, at a point in the middle of Fourteenth street where the middle of Sixth avenue intersects the middle of Fourteenth street, and run thence along the middle of Fourteenth street to Hudson river; thence westerly and along the northerly boundary of the Ninth ward to low-water mark on the west side of Hudson river, or so far as the limits of this State extend; thence northerly along the west side of Hudson river, at low-water mark, or along the limits of this State, to a point opposite the middle of the westerly end of Twenty-sixth street; thence in a direct line across Hudson river through the middle of Twenty-sixth street to the middle of Sixth avenue, and thence southerly along the middle of Sixth avenue to the place of beginning.

TWENTIETH WARD. § 21. The Twentieth ward shall begin at a point formed by the intersection of the middle of Twenty-sixth street with the middle of Sixth avenue, and run thence westerly along the middle of Twenty-sixth street to Hudson river; thence westerly along the northerly boundary of the Sixteenth ward to low-water mark on the west side of Hudson river, or so far as the limits of the State extend; thence northerly along the west side of Hudson river, at low-water mark, or along the limits of this State, to a point opposite the middle of the westerly end of Fortieth street; thence in a direct line across Hudson river, through the middle of Fortieth street to the middle of Sixth avenue, and thence southerly along the middle of Sixth avenue to the place of beginning.

9. The ninth district embraces the twelfth ward, except that portion thereof which lies west of the center line of Lenox or Sixth avenue and of the Harlem river north of the terminus of Lenox avenue.

Note to Charter section 1360, subdivision 9.

TWELFTH WARD. § 13. The Twelfth ward shall include all that part of the city and county of New York lying northerly of a line running through the middle of Eighty-sixth street from the East to the North river, and south and west of Harlem river and Spuyten Duyvil creek, but including Randall's and Ward's Islands.

10. The tenth district embraces the twenty-second ward and all that portion of the twelfth ward which is bounded on the north by the center line of One Hundred and Tenth street, on the south by the center line of Eighty-sixth street, on the east by the center line of Sixth avenue and on the west by the North river.

Notes to Charter section 1360, subdivision 10.

TWENTY-SECOND WARD. § 23. The Twenty-second ward shall begin at a point formed by the intersection of the middle of Fortieth street with the middle of Sixth avenue, and run thence westerly along the middle of Fortieth street to Hudson river; thence westerly along the northerly boundary of the Twentieth ward to low-water mark on the west side of Hudson river, or so far as the limits of the State extend; thence northerly along the west side of Hudson river, at low-water mark, or along the limits of this State, to a point opposite the middle of the westerly end of Eighty-sixth street; thence in a direct line across Hudson river, through the middle of Eighty-sixth street, to the middle of Sixth avenue, and thence southerly along the middle of Sixth avenue to the place of beginning.

The Twelfth ward boundaries are described in the note to Charter section 1360, subdivision 9.

The former Tenth Judicial District Court, which comprised the Twenty-third and Twenty-fourth wards, is now the Second district of "The Municipal Court of the City of New York" in the borough of The Bronx.

11. The eleventh district embraces that portion of the twelfth ward which lies north of the center line of West One Hundred and Tenth street and west of the center line of Lenox or Sixth avenue and of the Harlem river north of the terminus of Lenox or Sixth avenue.

Note to Charter section 1360, subdivision 11.

The boundary of the Twelfth ward will be found under Charter section 1360, subdivision 9.

Borough of Brooklyn.

CHARTER, § 1361. In the borough of Brooklyn there shall be five districts, as follows:

1. The first district embraces the first, second, third, fourth, fifth, sixth, tenth and twelfth wards.

Notes to Charter section 1361, subdivision 1.

These wards are bounded and described as follows:

The FIRST WARD of the city shall comprise the following district, namely: Beginning at a point on Fulton avenue where the center lines of Fulton street and Boerum place intersect each other, and running thence northwesterly along the center of Fulton street, and a line in continuation thereof to the East river; thence southwesterly along the East river to a point opposite the center of Atlantic avenue, or a line in continuation thereof; thence easterly along the center of Atlantic street to the center of Boerum place; and thence northerly along the center of Boerum place to the place of beginning. Laws 1888, chap. 583, § 2.

The SECOND WARD of said city shall comprise the following district, namely: Beginning at a point on the East river at the center line of Fulton street continued, and running thence southeasterly along the center line of Fulton street to a point opposite the center of Sands street; thence easterly along the center of Sands street to the center of Bridge street; thence northerly along the center of Bridge street and a line in continuation thereof to the East river; and thence westerly along the East river to the place of beginning. Laws 1888, chap. 583, § 3.

The THIRD WARD of said city shall comprise the following district, namely: Beginning at a point formed by the intersection of the center

of Boerum and Fulton streets; thence easterly along the center of Fulton street to the intersection of Fulton avenue and Flatbush avenue; thence southerly along the center of Flatbush avenue to the center of Fourth avenue; thence southwesterly along the center of Fourth avenue to the center of Bergen street; thence northwesterly along the center of Bergen street to the center of Court street; thence northerly along the center of Court street to the center of Atlantic street; thence along the center of Atlantic street to the center of Boerum place, and thence northeasterly along the center of Boerum place to the place of beginning. Laws 1888, chap. 583, § 4.

The FOURTH WARD of said city shall comprise the following district, namely: Beginning at a point where the center lines of Sands street and Fulton street intersect each other, and running thence easterly along the center of Sands street to the center of Bridge street; thence southerly along the center of Bridge street to the center of Fulton street; and thence northwesterly along the center of Fulton avenue and Fulton street to the place of beginning. Laws 1888, chap. 583, § 5.

The FIFTH WARD of said city shall comprise the following district, namely: Beginning at a point where the center lines of Bridge street and Johnson street intersect each other, and running thence easterly along the center of Johnson street to the center of Navy street; thence northerly along the center of Navy street to the northerly side of Nassau street; thence easterly along the northerly side of Nassau street to the southwesterly corner of the United States navy yard; thence northerly, northwesterly and northeasterly along the United States navy yard to the East river; thence westerly along the East river to a point on the continuation of the center line of Bridge street; thence southerly along the center of Bridge street to the place of beginning. Laws 1888, chap. 583, § 6.

The SIXTH WARD of said city shall comprise the following district, namely: Beginning on the East river, at the center of Atlantic street, thence easterly along the center of Atlantic street to the center of Court street; thence southerly along the center of Court street to the center of Fourth place; thence westerly along the center of Fourth place to the center of Henry street; thence southeasterly along the center of Henry street to the center of Coles street; thence westerly along the center of Coles street to the center of Hamilton avenue; thence along the center of Hamilton avenue to the East river; thence along the East river to the place of beginning. Laws 1888, chap. 583, § 7.

The TENTH WARD of said city shall comprise the following district, namely: Beginning at a point formed by the intersection of the center of Fourth avenue and Bergen street; thence running southwesterly along the center of Fourth avenue to the center of First street; thence northwesterly along the center of First street to the center of Gowanus canal; thence southerly and westerly along the center line of Gowanus

canal to a point where a line drawn in continuation of the center line of Fifth street would intersect the center line of Gowanus canal; thence northwesterly along said line drawn in continuation of the center line of Fifth street to the center line of Fifth street; thence northwesterly along the center of Fifth street and Fourth place to the center of Court street; thence along the center of Court street to the center of Bergen street, and thence southeasterly along the center of Bergen street to the place of beginning. Laws 1888, chap. 583, § 11.

The TWELFTH WARD of said city shall comprise the following district, namely: Beginning in the East river on the center line of Hamilton avenue; thence southerly along the center line of Hamilton avenue to the center of Coles street; thence southeasterly along the center of Coles street to the center of Henry street; thence northerly along the center of Henry street to the center of Fourth place; thence southeasterly along the center of Fourth place to the center of Smith street; thence northerly along the center of Smith street to the center of Fifth street; thence southeasterly along the center of Fifth street and along a line drawn in continuation of Fifth street to a point where said line would intersect the center of Gowanus canal; thence southwesterly along the center line of Gowanus canal to Gowanus bay; thence along the Gowanus bay and East river to the place of beginning. Laws 1888, chap. 583, § 13.

2. The second district embraces the seventh, ninth, eleventh, twentieth, twenty-first, and twenty-third wards.

Notes to Charter section 1361, subdivision 2.

By Laws 1901, chapter 140, the Eighth ward was taken out of this district and added to the Fifth district.

These wards are bounded and described as follows:

The SEVENTH WARD of said city shall comprise the following district, namely: Beginning at a point formed by the intersection of the middle lines of Bedford and Flushing avenues, running thence southerly along the center line of Bedford avenue to its intersection with the middle line of Brevoort place, and thence westerly along the middle line of Brevoort place to the middle line of Franklin avenue; thence southerly along the middle line of Franklin avenue to the middle line of Atlantic avenue; thence westerly along the middle line of Atlantic avenue to the middle line of Washington avenue; thence northerly along the middle line of Washington avenue to the middle line of Flushing avenue; thence easterly along the middle line of Flushing avenue to the point or place of beginning. Laws 1888, chap. 583, § 8.

The NINTH WARD of the city of Brooklyn shall comprise the following district, namely: Beginning at a point where the center lines of Flatbush and Fourth avenues intersect, running thence southeasterly along the center line of Flatbush avenue to the center line of Atlantic avenue: thence southeasterly along the center line of Atlantic avenue to the center line of Franklin avenue; thence southwesterly along the center line of Franklin avenue to the line separating the city of Brooklyn from the town of Flatbush; thence in a westerly direction along said line as the same now runs to the center line of Flatbush avenue; thence northwesterly along the center line of Flatbush avenue to the southern boundary of the Plaza; thence westerly along the southern boundary of the Plaza to the center line of Ninth avenue; thence northerly along a line in continuation of the center line of Ninth avenue to a point where said line would intersect a line drawn in continuation of the center line of Union street; thence northwesterly along said line and along the center line of Union street to the center line of Fourth avenue, and thence northeasterly along the center line of Fourth avenue to the point or place of beginning. Ordinances of City of Brooklyn, 1892, vol. 2, p. 894.

The ELEVENTH WARD of said city shall comprise the following district, namely: Beginning at a point where the center lines of Fulton street and Bridge street intersect each other; thence running northerly along the center of Bridge street to the center of Johnson street; thence easterly along the center of Johnson street to the center of Navy street; thence northerly along the center of Navy street to the center of Nassau street; thence easterly along Nassau street to the southwesterly corner of the United States navy yard; thence northerly along the same to the East river; thence easterly along the East river and Wallabout bay to the center line of Portland avenue, or a line in continuation thereof; thence southerly along the center of Portland avenue in a straight line, across Washington park to the center of Atlantic avenue; thence westerly along the center line of Atlantic avenue to a point where the center line of Atlantic street and Flatbush avenue intersect each other; thence northwesterly along the center of Flatbush avenue to the center of Fulton street, and thence westerly along the center of Fulton street to the point or place of beginning. Laws 1888, chap. 583, § 12.

The TWENTIETH WARD of said city shall comprise the following district, namely: Beginning at a point formed by the intersection of the center line of Washington avenue with the center of Atlantic avenue; running thence westerly along the center line of Atlantic avenue to the center line of Portland avenue; thence northerly along the center line of Portland avenue in a straight line across Washington park to the East river or Wallabout bay; thence easterly along the East river or Wallabout bay to the center of Washington avenue, and thence south-

erly along the center of Washington avenue to the center of Atlantic avenue to the point or place of beginning. Laws 1888, chap. 583, § 12.

The TWENTY-FIRST WARD of the city of Brooklyn shall comprise the following district, namely: Beginning at a point formed by the intersection of the middle lines of Bedford and Lafayette avenues; thence northerly along the middle line of Bedford avenue to its intersection with the middle line of Flushing avenue; thence easterly along the middle line of Flushing avenue to its intersection with the middle line of Broadway; thence southeasterly along the middle line of Broadway to its intersection with the middle line of Lafayette avenue; thence westerly along the middle line of Lafayette avenue to the place or point of beginning. Laws 1888, chap. 583, § 22.

The TWENTY-THIRD WARD of the city of Brooklyn shall comprise the following district, namely: Commencing at the intersection of Bedford and Lafayette avenues; running thence easterly along the center line of Lafayette avenue to the center line of Reid avenue; thence southerly along the center line of Reid avenue to the center line of Fulton street; thence westerly along the center line of Fulton street to the center of Utica avenue; thence southerly along the center of Utica avenue to the center of Atlantic avenue; thence westerly along the center of Atlantic avenue to the center of Franklin avenue; thence northerly along the center of Franklin avenue to the center of Brevoort place; thence easterly along the center of Brevoort place to the center of Bedford avenue; thence northerly along the center of Bradford avenue to the place of beginning. Ordinances of City of Brooklyn, 1892, vol. 2, p. 898.

3. The third district embraces the thirteenth, fourteenth, fifteenth, sixteenth, seventeenth, eighteenth and nineteenth wards.

Notes to Charter section 1361, subdivision 3.

These wards are bounded and described as follows:

The THIRTEENTH WARD of the city of Brooklyn shall comprise the following district, namely: Beginning at the permanent water line on the easterly side of the East river where the same would be intersected by the center line of Division avenue; thence in an easterly direction along the said center line of Division avenue to the center line of Rodney street; thence in a northeasterly direction along the center line of Rodney street to the center line of Grand street; thence in a northwesterly direction along the center line of Grand street to the permanent line of the East river; thence southwesterly along the permanent line of the East river to the center line of Division avenue,

the place of beginning. Ordinances of City of Brooklyn, 1892, vol. 2, p. 895.)

The FOURTEENTH WARD of said city shall comprise the following district, namely: Beginning at the easterly permanent line on the East river, where the same would be intersected by a line drawn through the center of Grand street; thence running in a southeasterly direction along the center of Grand street to the center of the intersection of Grand and Rodney streets; thence in a northeasterly direction along the center of Rodney street to the center of the intersection of North Second and Rodney streets; thence in an easterly direction along the center of North Second street to the center of the intersection of North Second street and Union avenue; thence in a northerly direction along the center of Union avenue to the center of the intersection of Union avenue by Driggs street; thence in a northeasterly direction along the center of Driggs street to the center of the intersection of North Fourteenth street by Fifth street; thence in a northwesterly direction along the center of North Fourteenth street to the center of the intersection of North Fourteenth and Kent avenue; thence in a southwesterly direction along the center of First and North Thirteenth streets; thence in a northwesterly direction along the center of North Thirteenth street to the easterly permanent line of East river; thence in a southwesterly direction along the easterly permanent line of East river to the center of Grand street, the place of beginning. Laws 1888, chap. 583, § 15.

The FIFTEENTH WARD of said city shall comprise the following district, namely: Beginning at the center of the intersection of South Second and Rodney streets; thence running in a southeasterly direction along the center of South Second street to the center of the intersection of South Second street by Union avenue; thence in a northerly direction along the center of Union avenue to the center of the intersection of Ten Eyck street by Union avenue; thence in an easterly direction along the center of Ten Eyck street to the center of the intersection of Wyckoff street and Bushwick avenue; thence in a northwesterly direction along the center of Bushwick avenue to the center of the intersection of Bushwick avenue and North Second street; thence in a westerly direction along the center of North Second street to the center of the intersection of North Second street and Humboldt street; thence in a northerly direction along the center of Humboldt street; thence in a northerly direction along the center of Smith street to the center of the intersection of Humboldt street and Richardson street; thence in a westerly direction along the center of Richardson street to the center of the intersection of Richardson and Leonard streets; thence in a northerly direction along the center of Leonard street to the center of the intersection of Leonard and Van Pelt streets; thence in a westerly direction along the center of Van Pelt street to the center of the inter-

section of Van Pelt street by Driggs street; thence in a southwesterly direction along the center of Driggs street to the center of the intersection of Union avenue by Driggs street; thence in a southerly direction along the center of Union avenue to the center of the intersection of Union avenue and North Second street; thence in a westerly direction along the center of North Second street to the center of the intersection of Rodney street by North Second street; thence in a southwesterly direction along the center of Rodney street to the intersection of Rodney and South Second streets, the place of beginning. Laws 1888, chap. 583. § 16.

The SIXTEENTH WARD of the said city shall comprise the following district, namely: Beginning at the intersection of the center lines of Rodney street on Broadway; running thence southeasterly along the center line of Broadway to the center line of Flushing avenue; thence in an easterly direction along the center line of Flushing avenue to the center line of Bushwick avenue or road as the same was originally laid down on the commissioner's map of the town of Bushwick; thence in a northerly, northwesterly and northeasterly direction along the center line of Bushwick avenue or road as the same was so laid down to the center line of Ten Eyck street; thence westerly along the center line of Ten Eyck street to the center line of Union avenue; thence in a southerly direction along the center line of Union avenue to the center line of South Second street; thence in a northwesterly direction along the center line of South Second street to the center line of Rodney street; thence in a southwesterly direction along the center line of Rodney street to the center line of Broadway, the place of beginning. Ordinances of City of Brooklyn, 1892, vol. 2, p. 895.

The SEVENTEENTH WARD of said city shall comprise the following district, namely: Beginning at the easterly permanent line of the East river, where the same would be intersected by a line drawn through the center of North Thirteenth street; thence running in a southeasterly direction along the center of North Thirteenth street to the center or the intersection of North Thirteenth and Kent avenue; thence northeasterly along the center of Kent avenue to the center of the intersection of North Fourteenth and First streets; thence in a southeasterly direction along the center of North Fourteenth street to the center of the intersection of North Fourteenth street by Van Cott avenue; thence along the center of Van Cott avenue in a northeasterly direction to the center of the intersection of Van Pelt street by Van Cott avenue; thence in an easterly direction along the center of Van Pelt street to the center of the intersection of Van Pelt and Leonard streets; thence in a southerly direction along the center of Leonard street to the center of the intersection of Leonard and Richardson streets; thence in an easterly direction along the center of Richardson street to the center of the

intersection of Meeker avenue by Richardson street; thence in a northeasterly direction along the center of Meeker avenue, in all its turnings, to the center of Newtown creek; thence in a northwesterly direction along the center of Newtown creek in all its meanderings, to the permanent line of the East river to a point where the permanent line of the East river would intersect the center of Newtown creek if continued; thence along the easterly permanent line of the East river in a southerly direction to the center of North Thirteenth street to the place of beginning. Laws 1888, chap. 583, § 18.

The EIGHTEENTH WARD of said city shall comprise the following district, namely: Beginning at the center of the intersection of Richardson street and Meeker avenue; thence running in a northeasterly direction along the center of Meeker avenue to the center of Newtown creek; thence in a southeasterly direction along the center of Newtown creek to the line of the county of Queens; thence southeasterly along the line of the county of Queens to the center of Flushing avenue at its intersection with the said line of the county of Queens; thence southwesterly and westerly along the center of Flushing avenue until it intersects the center of Bushwick avenue or road as the same was originally laid down on the commissioner's map of the town of Bushwick; thence along the center of said Bushwick avenue or road as the same was so laid down to the center of Ten Eyck street; thence along the center line of Bushwick as the same now exists to the center of the intersection of Bushwick avenue and North Second street; thence westerly along the center of North Second street to the center of the intersection of North Second and Humboldt streets; thence northerly along the center of Humboldt street to the center of the intersection of Humboldt and Richardson streets; thence along the center of Richardson street to the point or place of beginning. Ordinances of City of Brooklyn, 1892, vol. 2, p. 896.

The NINETEENTH WARD of the city of Brooklyn shall comprise the following district, namely: Beginning at a point formed by the intersection of the center line of Broadway with the center line of Flushing avenue, running thence westerly along the center line of Flushing avenue to the center line of Washington avenue; thence northerly along the center line of Washington avenue to the Wallabout canal; thence northwesterly along said canal to Wallabout bay; thence northwesterly along said Wallabout bay to the center line of Division avenue; thence easterly along the center line of Division avenue to the center line of Rodney street; thence northeasterly along the center line of Rodney street to the center line of Broadway; thence southeasterly along the center line of Broadway to Flushing avenue, at the point or place of beginning. Ordinances of City of Brooklyn, 1892, vol. 2, p. 896.

4. The fourth district embraces the twenty-fourth, twenty-fifth, twenty-sixth, twenty-seventh and twenty-eighth wards.

Notes to Charter section 1361, subdivision 4.

These wards are bounded and described as follows:

The TWENTY-FOURTH WARD of the city of Brooklyn shall comprise the following district, namely: Beginning at a point formed by the intersection of Franklin and Atlantic avenues, running thence in a southerly direction along the middle line of Franklin avenue to the city line; thence in an easterly direction along the city line to the middle line of Atlantic avenue, and thence in a westerly direction along the middle line of Atlantic avenue to the point or place of beginning. Laws 1888, chap. 583, § 25.

The TWENTY-FIFTH WARD of the city of Brooklyn shall comprise the following district, namely: Commencing at the center line of Reid and Lafayette avenues; thence southerly along the center of Reid avenue to the center of Fulton street; thence westerly along the center of Fulton street to the center of Utica avenue; thence southerly along the center of Utica avenue to the center of Atlantic avenue; thence easterly along the center of Atlantic avenue to the former boundary line between the city of Brooklyn and the town of New Lots; thence northerly along said boundary line to the center line of Broadway; thence along the center of Broadway to the center of Lafayette avenue; thence westerly along the center of Lafayette avenue to the place of beginning. Ordinances of City of Brooklyn, 1892, vol. 2, p. 898.

The TWENTY-SIXTH WARD of the city of Brooklyn shall comprise the following district, to wit: All that portion of the county of Kings, formerly known as the town of New Lots. Laws 1888, chap. 583, § 27.

The TWENTY-SEVENTH WARD of said city shall comprise the following district, namely: Beginning at the center of the intersection of Broadway and Kosciusko street; thence running in a northeasterly direction along the center of Kosciusko street to the intersection of Bushwick avenue and Kosciusko street; thence running in a northwesterly direction along Bushwick avenue to the intersection of Bushwick avenue and Stockholm street; thence in a northeasterly direction along the center of Stockholm street to the intersection of the line of the county of Queens; thence northerly or nearly so along the line of the county of Queens to the center of Flushing avenue at its intersection with the said line of the county of Queens; thence southwesterly and westerly along the center of Flushing avenue to the center of the intersection of Broadway; thence southwesterly along the center of Broadway to the point or place of beginning. Laws 1892, chap. 57.

The TWENTY-EIGHTH WARD of the said city shall comprise the following district, namely: Beginning at the center of the intersection of Broadway and Kosciusko street; thence running in a northeasterly direction along the center of Kosciusko street to the intersection of Bushwick avenue and Kosciusko street; thence running in a northwesterly direction along the center of Bushwick avenue to the intersection of Bushwick avenue and Stockholm street; thence in a northeasterly direction along the center of Stockholm street to the intersection of the line of the county of Queens; thence in a southerly direction along the line of the county of Queens to the westerly line of the Twenty-sixth ward, formerly the town of New Lots; thence southwesterly along the said line to the intersection of the center of Broadway; thence northwesterly along the center of Broadway to the place of beginning. Laws 1892, chap. 57.

5. The fifth district embraces the eighth, twenty-second, twenty-ninth, thirtieth, thirty-first and thirty-second wards.

Notes to Charter section 1361, subdivision 5.

By Laws of 1901, chapter 140, the Eighth ward was taken out of the Second district and added to this district.

These wards are bounded and described as follows:

The EIGHTH WARD of the city of Brooklyn shall comprise the following district, namely: Beginning at a point where the center line of Prospect avenue intersects Gowanus bay and running thence southeasterly along the center line of Prospect avenue to the center line of Sixth avenue; thence southwesterly along the center line of Sixth avenue to the center line of Twenty-third street; thence southeasterly along the center line of Twenty-third street to the center line of Seventh avenue; thence northeasterly along the center line of Seventh avenue to the southerly side of Twentieth street; thence southeasterly along the southerly side of Twentieth street to a point distant one hundred feet northwesterly from the corner formed by the intersection of the southerly side of Twentieth street with the westerly side of Ninth avenue; thence southwesterly on a line parallel with and distant one hundred feet from the westerly side of Ninth avenue to the northerly line of Twenty-first street; thence southeasterly along the northerly line of Twenty-first street to the westerly line of Ninth avenue, and thence northeasterly along the westerly line of Ninth avenue to southerly side of Twentieth street, and thence southeasterly along the southerly side of Twentieth street to the westerly line of Tenth avenue; thence south-

westerly along the westerly line of Tenth avenue, to the southerly side of Twenty-second street as laid down on the commissioner's map of the city of Brooklyn; thence southeasterly along the southerly side of Twenty-second street as so laid down to the line separating the town of Flatbush from the city of Brooklyn; thence southwesterly along the said division line to the line of the town of New Utrecht; thence along the line separating the city of Brooklyn from the town of New Utrecht as the same now runs to the bay of New York; thence northeasterly along the said bay and along Gowanus bay to the place of beginning. Ordinances of City of Brooklyn, 1892, vol. 2, p. 894.

The TWENTY-SECOND WARD of the city of Brooklyn shall comprise the following district, namely: Beginning at a point where the southerly boundary of the Plaza intersects the center line of Flatbush avenue; running thence southeasterly along the center line of Flatbush avenue to the line separating the town of Flatbush from the city of Brooklyn; thence along said division line as it now runs to the southerly side of Twenty-second street as laid down on the commissioner's map of the city of Brooklyn; thence westerly along said southerly side of Twenty-second street as so laid down to the westerly side of Tenth avenue; thence northeasterly along the westerly side of Tenth avenue to the southerly side of Twentieth street; thence northwesterly along the southerly side of Twentieth street to the westerly side of Ninth avenue; thence southwesterly along said westerly side of Ninth avenue to the northerly line of Twenty-first street; thence northwesterly along the northerly side of Twenty-first street one hundred feet; thence northeasterly on a line parallel with and distant one hundred feet from the westerly line of Ninth avenue to the southerly side of Twentieth street; thence northwesterly along the southerly side of Twentieth street to the center line of Seventh avenue; thence southwesterly along the center line of Seventh avenue to the center line of Twenty-third street; thence northwesterly along the center line of Twenty-third street to the center line of Sixth avenue; thence northeasterly along the center line of Sixth avenue to the center line of Prospect avenue; thence northwesterly along the center line of Prospect avenue to the center line of the Gowanus' bay or canal; thence northeasterly along said center line of said bay or canal as the same now runs to the center line of First street as originally laid out on the commissioner's map of the city of Brooklyn; thence southeasterly along the center line of First street as so laid out to the center line of Fourth avenue; thence northeasterly along the center line of Fourth avenue to the center line of Union street; thence southeasterly along the center line of Union street and a line drawn in continuation thereof to a point where said line in continuation of the center line of Union street intersects a line drawn in continuation of the center line of Ninth avenue; thence along the line drawn in con-

tinuation of the center line of Ninth avenue to the southerly boundary of the Plaza; thence easterly along the southerly boundary of the Plaza to the place of beginning, including the southerly and westerly boundaries of Prospect park as established by law. Ordinances of City of Brooklyn, 1892, vol 2, p. 897.

The TWENTY-NINTH WARD of said city comprises all that territory within the limits of the town of Flatbush in the county of Kings as the same was constituted on the twenty-fifth day of April, one thousand eight hundred and ninety-four. Laws 1894, chap. 356.

The THIRTIETH WARD of said city comprises all that territory within the limits of the town of New Utrecht in the county of Kings as the same was constituted on the third day of May, one thousand eight hundred and ninety-four. Laws 1894, chap. 451.

The THIRTY-FIRST WARD of said city comprises all that territory within the limits of the town of Gravesend in the county of Kings as the same was constituted on the third day of May, one thousand eight hundred and ninety-four. Laws 1894, chap. 449.

The THIRTY-SECOND WARD of said city comprises all that territory within the limits of the town of Flatlands in the county of Kings as the same was constituted on the third day of May, one thousand eight hundred and ninety-four. Laws 1894, chap. 450.

Wards in the borough of Brooklyn; how designated.— The wards of the former city of Brooklyn are hereby continued, with their present boundaries and numbers, and shall be known and designated as wards of the borough of Brooklyn. Laws 1901, chap. 466, § 1577.

Borough of Queens.

CHARTER, § 1362. In the borough of Queens there shall be three districts, as follows:

1. The first district embraces ward one of said borough.

Note to Charter section 1362, subdivision 1.

Long Island City constitutes this ward. Laws 1901, chap. 466, § 1581.

2. The second district embraces wards two and three of said borough.

Note to Charter section 1362, subdivision 2.

The town of Newtown is ward two, and the town of Flushing is ward three. Laws 1901, chap. 466, § 1581.

3. The third district embraces wards four and five of said borough.

Note to Charter section 1302, subdivision 3.

The town of Jamaica is ward four, and that part of the town of Hempstead included within the city of New York, as constituted by this act, shall be known as ward five of the said borough of Queens. Laws 1901, chap. 466, § 1581.

Borough of Richmond.

CHARTER, § 1363. In the borough of Richmond there shall be two districts, as follows:

1. The first district embraces wards one and three of said borough.

Note to Charter section 1363, subdivision 1.

The towns of Castleton and Northfield comprise this district. The town of Castleton being ward one, and the town of Northfield being ward three. Laws 1901, chap. 466, § 1580.

2. The second district embraces wards two, four and five of said borough.

Note to Charter section 1363, subdivision 2.

The towns of Middletown, Southfield and Westfield comprise this district. The town of Middletown, being ward two, the town of Southfield being ward four, and the town of Westfield being ward five. Laws 1901, chap. 466, § 1580.

THE

MUNICIPAL COURT ACT OF THE CITY OF NEW YORK.

By Laws 1901, chap. 218, "An Act to provide for a commission to revise, amend, reform, simplify, abridge, and codify the laws, rules, practice, pleadings, forms, and proceedings of the municipal court of the city of New York, and the laws, rules, et cetera, relating to the clerks, officers, and attendants thereof, and the marshals attached thereto," the board of justices appointed seven of their number a commission to revise, amend and codify the laws relating to this court, with their reasons therefor, and transmit the same to the legislature; this resulted in the passage of the following act, which, by section 365 thereof, is to be cited as "The Municipal Court Act of the City of New York."

Laws 1902, Chap. 580.

AN ACT in relation to the municipal court of the city of New York, its officers and marshals.

PASSED with the acceptance of the city. Became a law April 14, 1902, with the approval of the Governor. In effect September 1, 1902.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Title I. Jurisdiction and general powers. (§§ 1–20.)
II. Actions; summons; parties. (§§ 25–53.)
III. Provisional remedies. Action to foreclose a lien on a chattel. (§§ 55–142.)
Article I. Order of arrest. (§§ 55–70.)
II. Attachment. (§§ 73–92.)
III. Replevin. (§§ 95–131.)
IV. Action to foreclose a lien on a chattel. (§§ 137–142.)

Title IV. Pleadings. (§§ 145–147.)
V. Proceedings between joinder of issue and trial. (§§ 193–226.)
Article I. Adjournments. Subpœnas. Attendance of witnesses. (§§ 193–200.)
II. Commissions and depositions. (§§ 205–226.)
VI. Trial; trial jurors. (§§ 230–243.)
VII. Judgment and execution. (§§ 248–277.)
Article I. Judgments. (§§ 248–256.)
II. Execution. (§§ 260–277.)
VIII. Clerks and officers. (§§ 282–306.)
Article I. Clerks and officers. (§§ 282–289.)
II. Marshals. (§§ 293–306.)
IX. Appeals. (§§ 310–327.)
X. Costs and fees. (§§ 330–356.)
XI. Definitions; effect of act; laws repealed. (§§ 360–366.)

TITLE I.

Jurisdiction and General Powers.

SECTION 1. Jurisdiction.
2. No jurisdiction in certain cases.
3. Removal.
4. Contempt of court; criminal.
5. Punishment.
6. In view of court.
7. Preceding three sections limited.
8. Contempts punishable civilly.
9. Process; where service may be made.
10. Justice to administer oaths.
11. Board of justices.
12. Board to make rules.
13. Court; by whom held.
14. Concurrence of majority.
15. Actions may be continued before another justice.
16. Death or removal of justice not to impair proceedings, et cetera.
17. Court; where held.
18. Seals.
19. Access to court-houses.
20. Code; rules of supreme court applicable; when.

SECTION 1. **Jurisdiction.**— Except as provided in the next section the municipal court of the city of New York

has jurisdiction in the following civil actions and proceedings:

Notes to section 1, "Jurisdiction."

Under title I of this act, "Jurisdiction and General Powers," the jurisdiction and general powers *of the court* are specified. As will be observed by the preamble of section 1 the court, and not the judge, now exercises such powers as are described in subdivisions 15 and 19 of section 1. See also note to § 1352 of the Charter.

This section and its nineteen subdivisions are constructed from the Consolidation Act of 1882 (chap. 410), § 1285, and The Greater New York Charter (Laws 1901, chap. 466), § 1364.

Amendment of a pleading.— This court may grant an amendment of a pleading involving a new cause of action or defense. *Hawkes* v. *Burke*, 34 Misc. Rep. 189.

Appearance by attorney.— Jurisdiction is obtained by a general appearance on behalf of defendant by an attorney, although he was retained to appear only specially to have service of summons set aside, if he had authority to appear at all. *Kramer* v. *Gerlach*, 28 Misc. Rep. 525, 59 N. Y. Supp. 855.

Consent.— Jurisdiction cannot be acquired by consent of the parties where, by law, it is not conferred upon the court, it being a well-established principle that consent cannot confer jurisdiction. In any case however, where the court has jurisdiction of the *subject-matter* it may acquire jurisdiction of the parties by their consent. Cowen's Treatise, §§ 19, 20.

While consent may waive error, it cannot confer jurisdiction. *Dakin* v. *Demming*, 6 Paige, 95; *Dudley* v. *Mayhew*, 3 N. Y. 9; *Coffin* v. *Tracy*, 3 Cai. 29; *Germond* v. *The People*, 1 Hill, 343; *Meyer* v. *Burger*, 2 Hoff. Ch. 1; *McMahan* v. *Rauhr*, 47 N. Y. 67.

Definition.— Jurisdiction is the power residing in the court to determine practically a given action, controversy, or question presented to it for decision. If this power does not exist with reference to any particular case, its determination by the court is an absolute nullity; if it does exist, the determination, however erroneous in fact, or in law, is binding upon the parties until reversed or set aside in some proceeding authorized by the practice brought for that express purpose. Pomeroy on Equity Jurisprudence, vol. 1, § 129, p. 111.

Jurisdiction of the *subject-matter* is power to adjudge concerning the general question involved, and is not dependent upon a particular state of facts which may appear in a particular case, arising, or which is claimed to have arisen, under that general question, or the ultimate existence of a good cause of action in the plaintiff therein. *Hunt* v. *Hunt*, 72 N. Y. 217, 228, 230.

It is the power to act upon the general or abstract question, and to determine and adjudge whether the particular facts presented call for the exercise of the abstract power. *Hughes* v. *Cuming*, 165 N. Y. 91.

Enjoining action.— An action will not be enjoined on the ground that the defendant has a counterclaim upon a prior indebtedness exceeding the jurisdiction of the court, where he knew, at the time of making the contract sued upon, that it could be enforced in such a court and that his counterclaim could not be introduced therein, and made no provision in the contract for its payment. *Michael* v. *Kronthal*, 13 Misc. Rep. 428.

Estoppel.— Defendants answering upon the merits, and giving the bond required by section 1366 of the city charter are estopped from asserting that the court has not jurisdiction of their persons. *Vogel* v. *Banks*, 60 App. Div. 459, 70 N. Y. Supp. 1010.

How acquired.— In the case of *Sangendorf* v. *Schultz*, 41 Barb. 102, the general nature of the jurisdiction and the distinction between the various modes in which it is obtained was considered. It was held that the jurisdiction upon the commencement of an action by summons did not attach by mere service of the summons, so as to render a judgment given before the hour of return valid. Jurisdiction is obtained by the return of the summons and the arrival of the hour at which the court is authorized to give judgment.

Power of the court limited.—This court being a court of limited jurisdiction can exercise only such power as is conferred by statute, and the proceedings must conform strictly thereto. *Loeb* v. *Smith*, 24 Misc. Rep. 200, 52 N. Y. Supp. 677; *Reubenstein* v. *Silberfeld*, 24 Misc. Rep. 201, 52 N. Y. Supp. 703.

This court is confined strictly to the authority given it. It takes nothing by implication, but must in every instance show that the power has been expressly granted. *Loomis* v. *Bowers*, 22 How. Pr. 361; *Ahern* v. *Nat. Steamship Co.*, 11 Abb. N. S. 362.

Submission of a controversy upon facts submitted.— See §§ 241, 242, 243.

1. An action to recover damages upon or for breach of contract, express or implied, other than a promise to marry, where the sum claimed does not exceed five hundred dollars.

Notes to section 1, subdivision 1.

This subdivision is identical with subdivision 1 of section 1364 of The Greater New York Charter of 1897, as amended by Laws 1901, chapter 466.

Account stated; implied assent.— To constitute an account stated an express assent thereto need not be shown, but such assent may be

implied from the circumstances. *Spellman* v. *Muehlfeld*, 166 N. Y. 245.

Attorney; cannot recover for useless work.— If an attorney-at-law does useless work, through inadvertence or inexperience, he cannot recover remuneration therefor, nor can he recover if he commences an action, in which special evidence is required by statute, without having first ascertained the existence of such evidence. *Leo* v. *Leyser*, 36 Misc. Rep. 549.

Liability of bailee.— The delivery for hire, of a team in good condition, and its return in a damaged condition *prima facie* entitles the bailor to damages against the bailees, though it was agreed that one of the bailees should drive the team. *Rutherford* v. *Krause*, 55 App. Div. 210. See also *Lyons* v. *Thomas*, 34 Misc. Rep. 175, 68 N. Y. Supp. 802; *Ister* v. *Linde*, 33 Misc. Rep. 465, 67 N. Y. Supp. 1072.

Id.; conversion.— If a bailee in innocent possession refused to inform the owner whether he has the chattel, this is an act of conversion. *Milligan* v. *Brooklyn W. & S. Co.*, 34 Misc. Rep. 55, 68 N. Y. Supp. 744.

Id.; negligence.— A bailee on storage of furs redelivered in a condition that reasonably imports lack of proper care, must rebut the presumption of negligence arising therefrom, though on the whole evidence the bailor must make out his case. *Mayer* v. *Coe*, 31 Misc. Rep. 733.

Id.; a restaurant-keeper is not an insurer of the effects of customers, but is required to use only the ordinary care called for by the circumstances, and cannot be charged for the loss of an overcoat laid aside by a customer, in the absence of proof of an actual bailment, notice to the restaurant-keeper or his servants of the fact that it was laid aside, or proof of the insufficiency of the general supervision for the protection of the propery of customers. *Montgomery* v. *Ladjing*, 30 Misc. Rep. 92.

Broker's commissions on sales and loan of real property.— Broker or agent must have written authority of owner. Laws 1901, chap. 128.

Contract; authority of employee to make.— Plaintiff's agent called upon one of the defendants and had a conversation with him in relation to installing a certain detective system in their store, and was referred by him to one of the employees of the firm, with whom he conducted subsequent negotiations and obtained a contract under which the work was performed. *Held*, that these facts showed sufficient authority in such employee to make the contract. *Morse* v. *Thurber et al.*, 7 Misc. Rep. 707.

Id.; breach of.— The contract of sale being an entire one, refusal to accept one installment of the merchandise is a breach entitling the seller to rescind and sue for damages on the whole contract. *Gauser* v. *Weber*, 35 Misc. Rep. 303, 71 N. Y. Supp. 773.

Id.; effect of refusal to perform.— Under a contract of conditional sale of a piano in the form of a lease, bill of sale to be given on pay-

ment of the last installment, terminable at seller's option on default, the seller may, upon the refusal of the buyer to accept the piano when tendered, recover the installments when they become due. *Gray* v. *Booth*, 64 App. Div. 231, 71 N. Y. Supp. 1015.

Id.; excusing performance is permitted where from the nature of the contract a condition may be implied that a party will be relieved from the consequences of nonperformance in some slight particular where the obligation is qualified, or where performance is rendered impossible without his fault. *Buffalo, etc., Co.* v. *Bellevue, etc., Co.*, 165 N. Y. 247.

Under a contract for advertising, plaintiff cannot recover as for performance by showing facts that excuse compliance with the contract. *Tribune Assn.* v. *Eisner, etc.*, 34 Misc. Rep. 658, 70 N. Y. Supp. 706.

Id.; performance.— A building contractor may recover as for substantial performance, where the work is deficient only in unimportant details which may be compensated for by deduction from the contract price. *Hall* v. *Long*, 34 Misc. Rep. 1, 68 N. Y. Supp. 522; *Vogel* v. *Friedman*, 34 Misc. Rep. 775, 68 N. Y. Supp. 820.

Conversion seems to consist in any tortious act by which the defendant deprives the plaintiff of his goods. *Spencer* v. *Blackman*, 9 Wend. 167; *Laverty* v. *Snethen*, 68 N. Y. 522.

Id.; agent.— An agent is liable for conversion when he parts with his principal's property in an unauthorized way. *Laverty* v. *Snethen*, 68 N. Y. 522.

Id.; authority.— It is in general sufficient to give a right of action to exercise authority over or interfere with the property of another to his damage. *Latimer* v. *Wheeler*, 1 Keyes, 468; affd., 30 Barb. 485.

Id.; bailee who refuses to inform owner whether he has the chattel commits an act of conversion. *Milligan* v. *Brooklyn W. & S. Co.*, 34 Misc. Rep. 55, 58 N. Y. Supp. 744.

Id.; boarding-house keeper's lien; judgment.— An action to enforce a boarding-house keeper's lien upon property of a boarder which he has clandestinely removed is one for conversion of personal property within the meaning of subdivision 2 of section 2895 of the Code, and the justice is bound to insert in the judgment the liability of the defendant to arrest upon execution. *Babcock* v. *Smith*, 47 N. Y. St. Rep. 118.

Id.; carrier.— A carrier who delivers goods to another is liable for conversion to a consignee who has made advances on them. *Bailey* v. *Hudson River R. R. Co.*, 49 N. Y. 70.

Id.; check.— An action for conversion lies in favor of an execution creditor for the destruction of a check while in the hands of a constable to whom it has been given in payment of a judgment by the drawer thereof. *Pawson* v. *Miller*, 66 App. Div. 12.

Id.; pledgee.— A refusal by a pledgee to deliver up a pledge on tender of the debt and interest is a conversion of the pledge. *Case* v.

Higenbotam, 100 N. Y. 248, revg. 27 Hun, 406. So is a sale of stock by the pledgee after tender of the debt and without authority. *Hope* v. *Lawrence*, 1 Hun, 317.

Id.; stolen horse.— One who innocently purchases a stolen horse is liable to the owner for conversion. *Bates* v. *Riordan*, 21 Week. Dig. 134.

Id.; value.— In an action for conversion, proof of what plaintiff had paid for the article alleged to have been converted is no proof of its value, upon which plaintiff can recover more than nominal damages. *Whitmark* v. *Lorton*, 15 Daly, 548; s. c., 29 N. Y. St. Rep. 322, 8 N. Y. Supp. 480.

Damages, measure of.— In an action to recover damages for a breach of a contract by which the plaintiffs agreed to manufacture and sell to the defendant a quantity of garments, which breach grew out of the defendant's refusal to accept the garments, the measure of damages is the difference between the contract price and the actual cost of manufacturing and delivering the goods. In such a case the plaintiffs can recover only the lowest sum which they would have received as profit if the contract had been fulfilled in any form which answered its terms. *Dryfoos* v. *Uhl*, 69 App. Div. 118.

Decedent's debts.— As to whether this court has jurisdiction of an action to charge the next of kin of a decedent with his debts, brought under the Code of Civil Procedure, § 1837, *quære? Siegel* v. *Cohen*, 23 Misc. Rep. 365; s. c., 51 N. Y. Supp. 318.

Goods manufactured according to specifications and sale by sample. —A sale by sample cannot be based upon the mere fact that the vendee selected a certain type or style of goods from various grades exhibited to him without any distinct stipulation that the goods to be delivered were to correspond with any designated sample, especially where he orders them manufactured according to specifications furnished by him and which call for an article different in many particulars from any exhibited to him, and therefore in such a case no warranty can be implied which will survive delivery and acceptance. *Smith* v. *Coe*, 170 N. Y. 162.

Infant; right of, to bring action.— Where an infant has a right of action he is entitled to maintain an action thereon; and the same should not be delayed on account of his infancy. Code Civ. Proc., § 468, made applicable by § 3347, subd. 3, of said Code.

Id.; necessaries.— The obligation of an infant to pay for necessaries furnished to him is not greater than the obligation of his father in respect thereto; they must be strictly necessaries, and in substance are limited to such articles as are requisite for the body or for the proper cultivation of the mind.

The infant cannot be charged with more than the fair value of the necessaries furnished, even though he contracted to pay more.

Theater tickets are not necessaries for an infant attending college.

An infant is not liable for borrowed money unless it is shown that it was applied to his personal use for some necessity. *Gray* v. *Sands*, 66 App. Div. 572.

Id.; physician.— A physician called by a mother to attend her infant child is not chargeable with constructive notice of the fact that the father and mother of the child do not live together, and the father is responsible to the physician for the value of the services thus rendered. *Dixon* v. *Chapman*, 56 App. Div. 542.

Id.; wages of.— Parent or guardian who claims wages of minor must notify employer within thirty days after commencement of service, in default of which notice payment to the minor is valid. Laws 1850, p. 579, chap. 266; 24 Barb. 634.

Notification, effect of.— *McClurg* v. *McKercher*, 56 Hun, 305. Effect of failure to notify employer. *Watson* v. *Kemp*, 42 App. Div. 372. See also Domestic Relations Law (1896, chap. 272), § 42.

Installments on conditional sales; hiring, etc.— By section 139 of this act an action may be maintained to recover a sum or sums due and payable for installment, payment, or hiring.

Married woman's necessaries; abandonment.—Where the wife leaves the husband without justification, he cannot be charged with her support. *Catlin* v. *Martin*, 69 N. Y. 393. What constitutes justification. See *Sykes* v. *Halstead*, 1 Sandf. 483; *Blomers* v. *Sturtevant*, 4 Den. 46.

Id.; agency.— A complaint in an action to recover for necessaries furnished to a wife is sufficient if it contains allegations which, if alleged in a declaration at common law, would have a cause of action for goods furnished. The fact that it also alleges, in a case where the defendant and his wife were living separate and apart from each other, that the purchase was made by her as his agent, will not preclude a recovery without proof of an express agency, and the exclusion of evidence tending to show that the articles furnished were necessaries for the wife and children, on the ground that it tended to prove a different cause of action, is reversible error. *Hatch* v. *Leonard*, 165 N. Y. 435, revg., 38 App. Div. 128.

Id.; credit of the husband.— It must be shown that the necessaries were furnished on the credit of the husband. *Errick* v. *Bucki*, 7 Misc. Rep. 118.

A husband who abandons his wife and neglects to support her is liable for moneys loaned to the wife on his credit, where it appears that such moneys were used by the wife in the purchase of necessaries. *Kenny* v. *Meislahn*, 69 App. Div. 572.

Id.; counsel fee; liability of husband for services of attorney.— The reasonable value of the services of an attorney rendered in preparing papers in a suit for separation by a wife against her husband, necessary to be brought for her protection while she was living with him,

but which papers were never served, the parties having become reconciled, may be recovered from the husband upon the ground of his wife's implied agency to bind him for necessaries. *Langbein* v. *Schneider*, 27 Abb. N. C. 228. The lamented Austin Abbott in a note to this case says: "The importance of this question, and the absence of controlling authority in this State, leads me to present the argument of counsel with unusual fullness." See also *Naumer* v. *Grey*, 28 App. Div. 529.

Id.; Domestic Relations Law as to "Certain rights and liabilities of husband and wife" is to be found in Laws 1896, chap. 272, §§ 20–29, p. 219.

Id.; separate maintenance.— If the husband provides for his wife's separate maintenance, it will relieve him of his liability. *Baker* v. *Barney*, 8 Johns. 72; *Fenner* v. *Lewis*, 10 Johns. 38; *Raymond* v. *Condrey*, 19 Misc. Rep. 34.

In an action to recover for necessaries furnished by the plaintiff to the defendant's wife in which evidence is given tending to show that, at the time the necessaries were furnished, the defendant was living apart from his wife and that he had made an adequate allowance for her maintenance and support, it is error for the court to charge that the plaintiff can recover if the jury find that he did not know or have cause to know that the husband and wife were living apart and that the latter was supplied with a suitable allowance. *Hatch* v. *Leonard*, 71 App. Div. 32.

Money deposited; accounting.— This court has jurisdiction of an action to recover money deposited with defendant by plaintiff as an assurance that an agreement for a partnership would be executed within a time specified and not requiring an accounting. *Lampert* v. *Ravid*, 33 Misc. Rep. 115, 67 N. Y. Supp. 82.

Money had and received; accounting.— This court has jurisdiction of an action for money had and received to the use of plaintiff, though it was paid by another to defendant in violation of plaintiff's rights, the amount being fixed and less than $500, and no accounting required or equity to be determined. *Dechen* v. *Dechen*, 59 App. Div. 166, 68 N. Y. Supp. 1043.

Partnership.— Where the defendant, in an action for money had and received, admits that he received and holds for the use of the plaintiff a specified sum, the fact that such fund arose out of a partnership transaction is immaterial, and does not deprive this court of jurisdiction of the action. *Eckert* v. *Clark*, 16 Misc. Rep. 67.

Promissory notes; action upon lost negotiable paper.— See Code Civ. Proc., § 1917. In an action upon negotiable paper, which has been lost, the giving of a bond under the statute, with sufficient sureties, conditioned to indemnify the defendant against all claims by any other person on account thereof, is an essential prerequisite to any recovery thereon. *Desmond* v. *Rice*, 1 Hilt. 530. See also § 240.

Id.; accommodation note; usury.— A promissory note, made for the accommodation of the payee, and transferred by him before maturity to a third person at a discount which made the interest reserved forty per cent. per annum, is not enforceable by the transferee against the accommodation maker. Want of knowledge on the part of the transferee that the note was accommodation paper and had no inception until it passed into his hands is immaterial. The Negotiable Instruments Law (Laws 1897, chap. 612) has not altered the rule. *Strickland* v. *Henry*, 66 App. Div. 23.

Rent due on a holiday, other than Sunday, is payable on that day. *Walton* v. *Stafford*, 162 N. Y. 558.

Statute of frauds.— An oral contract of employment not by its terms to extend beyond one year, nor for any definite time, is not void. *Rochester, etc., R. Co.* v. *Browne*, 55 App. Div. 444, 66 N. Y. Supp. 867.

Terms of contract.— Plaintiff sued upon a written contract for the payment to it of a specified sum monthly, for advertising defendant's business in the street cars of a certain city, demanding the amount due for one month. Defendant interposed a general denial coupled with an admission of the execution of the contract, but the litigation concerned the terms thereof, and a less sum than that specified was recovered. *Held*, that the recovery should be sustained against the objection that the court had exercised equity powers in reforming the contract, the evidence supporting the judgment rendered. *Railway Advertising Co.* v. *Standard Rock Candy Co.*, 29 Misc. Rep. 115, 60 N. Y. Supp. 265.

Title.— An action by the purchaser for damages for a vendor's breach of contract to convey a good title is within the jurisdiction of this court, not being a cause in equity. *Katz* v. *Henig*, 32 Misc. Rep. 672, 66 N. Y. Supp. 530.

Waiver of amount in excess of jurisdiction.— A recovery in excess of the jurisdiction may be waived and a recovery had up to that amount. *Globe* v. *Rauch*, 21 Misc. Rep. 48.

2. An action upon a bond conditioned for the payment of money where the sum claimed to be due does not exceed five hundred dollars, the judgment to be rendered for the sum actually due. Where the sum secured by the bond is to be paid in installments, an action may be brought for each installment as it becomes due.

Notes to section 1, subdivision 2.

This subdivision is the same as former subdivision 4 of section 1364 of the Charter of 1897, as amended in 1901, and was formerly sub-

division 2 of section 1285 of the Consolidation Act (Laws 1882, chap. 410).

Subdivisions 3, 4, and 5 of section 1364 of this act are all provisions for actions on bonds or undertakings.

See under subd. 3 for notes upon undertakings and bonds.

3. An action upon a surety bond or undertaking taken in any court where the amount claimed in the summons does not exceed the sum of five hundred dollars.

Notes to section 1, subdivision 3.

This subdivision is taken from subdivision 5 of the Charter of 1897, as amended in 1901, and was formerly subdivisions 4 and 12 of section 1285 of the Consolidation Act (Laws 1882, chap. 410).

Action on undertaking when maintainable against sureties in an undertaking given on behalf of the defendant to procure a return of the chattel, or against the bail of a defendant who has been arrested. See § 126, and notes.

Amendment of undertaking can only be had with consent of the sureties. *Langley* v. *Warren*, 1 N. Y. 606; s. c., 3 How. Pr. 363, 1 Code Rep. 111: *Wilson* v. *Allen*, 3 How. Pr. 369. Consult however *Wood* v. *Kelly*, 2 Hilt. 334; *Irwin* v. *Muir*, 13 How Pr. 409; s. c., 4 Abb. Pr. 133. See *Robinson* v. *Moran*, 23 Week. Dig. 326.

Appearance, bond for, given with sureties for appearance at court, to abide the order of the court, where the person has been adjudged guilty of the misconduct alleged, and punishment by fine and imprisonment ordered, cannot be prosecuted at the same time that a warrant of commitment is issued against the party. The statute does not give the aggrieved party two final and complete remedies for the same offense. *Barton* v. *Butts*, 32 How. Pr. 456.

Arrest and imprisonment.— The arrest and imprisonment of a judgment debtor upon an execution against his body is in law a satisfaction of the judgment so long as the imprisonment continues, and during that period no action can be maintained by the judgment creditor against one standing as surety for the debtor, or to enforce collateral securities held for the payment of the judgment. Plaintiff commenced an action. B. made application to have the cause removed, giving the bond required by the statute (chap. 344, Laws 1857), conditioned for the payment of any judgment recovered against him. Plaintiff recovered judgment. In an action against the sureties upon the bond, defendants showed that B. was taken in execution upon the judgment. *Held*, that while B.'s imprisonment continued the bond could not be enforced either against him or his sureties; that as it did not appear that he had been

discharged, the presumption was his imprisonment did continue; and that the plaintiff could not maintain his action. *Kocnig* v. *Steckel*, 58 N. Y. 475.

Attachment.— The liability of the sureties on an undertaking given on obtaining an attachment is not affected by the fact that after the attachment was vacated it was reinstated, the order of reinstatement having afterward been itself vacated. *Epstein* v. *U. S. Fidelity & Guaranty Co.*, 29 Misc. Rep. 295, revg. 28 Misc. Rep. 440.

Where a motion to vacate an attachment, although at first successful, is denied on appeal but not apparently on the merits, and the action is thereafter tried and results in a judgment dismissing the complaint, the surety upon the undertaking given to secure the attachment is liable for the costs and expenses of the proceedings to vacate the attachment as well as for the costs and expenses of defending the action. *Tyng* v. *American Surety Co.*, 69 App. Div. 137.

Cause of action.— The sureties are only liable for the cause of action for which they gave an undertaking, so that if a replevin action fails and the complaint is amended, so as to set up an equitable lien upon which a recovery is had, the court is justified in the judgment in barring the remedy of the defendant upon the replevin bond. *National Bank, etc.* v. *Rogers*, 166 N. Y. 380, affg. 44 App. Div. 357.

In an action against sureties, in replevin, they are bound only according to the terms of their undertaking, and when defendant has not demanded in his answer a judgment of return of the property, he could not have a judgment awarding to him possession of the property; such a demand in the answer is necessary to give the justice jurisdiction to render such a judgment. *Brown* v. *Weppner*, 62 Hun, 581; *Salisbury* v. *Stinson*, 10 Hun, 242; *Frost* v. *Kopp*, 13 Civ. Pro. Rep. 377.

Discontinuance of action.— Plaintiff in replevin gave the usual undertaking. On the day fixed for trial he withdrew the action, defendant protesting, and a judgment of discontinuance was entered. In an action on the undertaking, *held*, that such withdrawal was a breach of the undertaking, and that plaintiff in this action was entitled to recover. *Tyler* v. *Miller*, 8 Week. Dig. 290.

Escape.— The action against sureties upon an undertaking for the jail limits must be begun by the service of the summons while the debtor is beyond the jail limits. The sureties are liable for the amount of the debt for which the debtor was committed, although the debtor is insolvent. *Flynn* v. *Union Surety & Guaranty Co.*, 61 App. Div. 170, 70 N. Y. Supp. 403.

Estoppel.— By giving the undertaking, the defendant is *estopped* from contradicting the facts recited and contained in it. *Haggard* v. *Morgan*, 4 Sandf. 198, 5 N. Y. 422; *Pendleton* v. *Franklin*, 3 Sandf. 572; *Decker* v. *Judson*, 16 N. Y. 439; *Coleman* v. *Bean*, 3 Keyes, 94, 1 Abb. App. Dec. 394.

The parties in a claim and delivery action may waive the formalities of the statutory proceedings, and in such case the sureties to the undertaking are bound by the waiver and are estopped from questioning the recitals in the undertaking, and this although they had no knowledge of the facts that the proceedings were not to be taken and the undertaking used in the manner prescribed by the statute. *Harrison* v. *Wilkins*, 69 N. Y. 412.

Where the defendant in a claim and delivery action, in which the plaintiff claims immediate delivery, after the sheriff has taken possession of the property, gives an undertaking pursuant to the Code, and upon the undertaking obtains delivery and retains the property, he is estopped thereby from denying that he had possession of the property at the time of the commencement of the action. *Diossy* v. *Morgan*, 74 N. Y. 11.

Evidence to impeach undertaking.— In an action on an undertaking it is error to exclude evidence that the order in pursuance of which it was given was void, for want of jurisdiction, by reason of the absence of one of the magistrates who should have taken part in the proceedings. *People ex rel. Commissioners of Public Charities and Correction of the City of New York* v. *Dando*, 20 Abb. N. C. 245.

Execution must have been issued and returned unsatisfied.— Where in an action of replevin the plaintiff recovers a judgment for the possession of the property with damages for its detention, and for a fixed sum in case a return cannot be had, he cannot maintain an action against the sureties to an undertaking, given by the defendant, until an execution has been issued to the sheriff in pursuance of the judgment and the same has been returned duly unsatisfied. *Hager* v. *Clute*, 10 Hun, 447.

Executor must sue in his representative capacity, and although an amendment from an individual to a representative capacity is allowed in the affidavit, the undertaking given citing him as an individual as claimant. *Held*, that judgment for the plaintiff could not be sustained. *Taylor* v. *Jackson*, 35 Misc. Rep. 300, 71 N. Y. Supp. 745.

Exempt property under execution; seizure of.— The sureties upon the official bond of a constable, who, under an execution against a householder, seizes a stove, sewing machine, linen, and wearing apparel, and other personal property, the value of which amounted to less than $50, and which comprises all the household furniture belonging to the householder, and was therefore wholly exempt, are liable to the householder for the value of the property, notwithstanding the fact that the latter did not forbid the sale.

The fact that the execution, under which the levy was made, was issued upon a judgment against the householder, obtained in part for exempt personal property, does not relieve the sureties from liabilities.

The official bond of the constable covers his illegal acts, and it is

not necessary to sue the constable first in order to enforce the liability of the sureties thereon. *Grieb* v. *Northrup*, 66 App. Div. 86.

Exception to and justification of sureties.— By section 70 of this act sections 106 to 110 and sections 127 and 128, relating to undertakings, sureties, and justification, are made applicable.

Fraud in making assignment.— This court has jurisdiction, in an action upon a bond given by a claimant of attached property, to try the question of fraud in the making of an assignment for the benefit of creditors under which the claimant claimed title to the property, as no affirmative relief on that ground is asked. *Malkemesius* v. *Pauly et al.*, 17 Misc. Rep. 371.

Insurance agent.— What modification of the contract between the company and its agent discharges the surety. *American Casualty Ins. Co.* v. *Green*, 70 App. Div. 267.

Joint and several liability.— Although the sureties did not execute an undertaking providing that they were jointly and severally liable, a defense that the undertaking was not executed by them "pursuant to the statute in such case made and provided" was held of no avail to them, that the provision was for the benefit of the obligee, and if he choose to accept it in the form it was given in, and it was not shown that the principal did not have the full benefit of the stay, the defense was not valid. *Denike* v. *Denike*, 61 App. Div. 492, 70 N. Y. Supp. 629.

Liability of sureties.— See notes to § 315.

Marshal's return is presumptive evidence against surety.— See §§ 127 and 271, subd. 3.

Mechanic's lien bond.—Sureties on a mechanic's lien bond may defend themselves and their principals in an action brought to foreclose it, in which action the judgment demanded is in form against the property represented by the bond, and therein may set up any legal or equitable defense which would have availed the principals and are not precluded from contesting an unjust, false, and exaggerated claim, by the default of the principals in failing to defend it. *Eschlimann* v. *Presbyterian Hospital*, 165 N. Y. 296.

Mistakes, omissions, defects, and irregularities, and general regulations respecting bonds and undertakings.— Sections 728, 729, 730, and 810 to 816 inclusive, of the Code of Civil Procedure apply to this court by subdivision 6 of section 3347.

Order of arrest.— Right of action on the undertaking where the order has been vacated. Measure of damages. Payments by the principal obligor. *Krause* v. *Rutherford*, 37 Misc. Rep. 382.

The undertaking given on obtaining an order of arrest, provided that if defendant "recover judgment herein, or if it is finally decided that plaintiff was not entitled to the order of arrest, plaintiff will pay all costs which may be awarded to defendants, and all damages which they,

or either of them, may sustain by reason of the arrest, not exceeding the sum of $250." *Held*, that a defendant, on procuring an order vacating the order for his arrest on the papers on which it was granted, was entitled to maintain an action on the undertaking, without waiting to obtain judgment in the action. *Krause* v. *Rutherford*, 45 App. Div. 132.

Held also, that defendant was not required to obtain leave of the court before bringing the action, the provisions of Code Civ. Proc., § 814, applying to undertakings given to the people or to public officers.

Held also, that he was entitled to recover counsel fees and expenses in moving to vacate the order of arrest up to the time of the commencement of the action and for loss of his time during his imprisonment, but not the whole $250, unless he showed damages to that amount.

Held also, that it was error to charge that the suffering he endured from his imprisonment, of either body or mind, was a proper element to be considered, and to refuse to charge, "The jury cannot award any damages because of any disgrace which has attended," the rule being different from that obtaining in an action for false imprisonment.

Removal.— The defendant is not bound to exhaust his remedies against the judgment debtor before bringing suit on the undertaking. *Johnson* v. *Ackerson*, 3 Daly, 430.

Replevin.— Failure of the defendant, successful in a replevin suit, to serve on the plaintiff a notice to return the property, as required by Code Civ. Proc., § 1725, is not a defect available to the sureties sued on the undertaking. *Christiansen* v. *Mendham*, 45 App. Div. 554.

Where the chattel replevied was not returned and the action was discontinued, the extent of the liability of the sureties upon an undertaking therefor is the value of the property replevied and not the penalty specified. *Pettit* v. *Allen*, 64 App. Div. 579, 72 N. Y. Supp. 287.

To establish such liability, it is necessary to prove that the plaintiff in replevin took possession of the chattel by virtue of his writ, the undertaking containing no such recital of possession as in the case of defendant's undertaking for the return of the property after it was taken from him. *Pettit* v. *Allen*, 64 App. Div. 579, 72 N. Y. Supp. 287.

Title to real property in question.— The sureties upon the undertaking given in such case may be sued in this court as provided in section 2, subdivision 1. And see § 180.

Undertaking synonymous with bond.— An undertaking being merely a simplified bond without seal, the equity of the statute giving a remedy upon the bonds, is applicable to undertakings. *People ex rel. Commissioners of Public Charities and Correction of the City of New York* v. *Dando*, 20 Abb. N. C. 245.

See as to the difference between bonds and undertakings and the right of action upon them, 1 Abb. N. S. 61, 464, 465, where the cases are collected. See also *Lutes* v. *Shelley*, 40 Hun, 197.

Vessels.— An undertaking given to enforce a lien on a vessel may be prosecuted in this court. Code Civ. Proc., § 3438.

4. An action in behalf of the people of the state or of the city of New York, brought by the direction of a commissioner of public charities or an overseer of the poor upon a bastardy or abandonment bond in a case where it is prescribed by law that such an action can be maintained.

Notes to section 1, subdivision 4.

This subdivision is taken from subdivision 8 of section 1285 of the Consolidation Act (Laws 1882, chap. 410), the Charter of 1897, as amended in 1901, and subdivision 3 of section 3215 of the Code of Civil Procedure. The amendment consists in omitting at the end thereof the words, "in said Municipal Court of the city of New York, or in any court not being a court of record."

Section 178 provides for, "Pleadings in actions on bastardy bonds," and section 339 provides for "Costs in action upon bastardy, et cetera, bonds."

Has jurisdiction been conferred in an action upon a bastardy or abandonment bond by this subdivision? — It is doubtful whether such jurisdiction has been given as it seems was sought to be done by the provisions of this subdivision. There is no "*case where it is prescribed by law that such an action can be maintained.*" The subdivision itself does not give the jurisdiction except in a case where it is prescribed by law that such an action can be maintained; but where is the case, and where is the law where it is prescribed that such an action can be maintained? Originally the District Courts had jurisdiction of such actions, the same being conferred by Laws 1862, chapter 389, section 1, which was repealed by Laws 1880, chapter 245, and Laws 1881, chapter 537, but no enactment has since been made prescribing that such an action can be maintained in this court. The former subdivision 8 of section 1364 of the Charter of 1897, as amended in 1901, read: "In a case where it is prescribed by law such an action can be maintained in said Municipal Court of the city of New York, or in any court not being a court of record." It will be observed that the amendment consists in omitting the words, "in said Municipal Court of the city of New York, or in any court not being a court of record." We fail to see how this omission confers the jurisdiction as the subdivision now reads. We have still to find the "case where it is prescribed by law that such an action can be maintained."

Subdivision 10 of section 1364 of the Charter of 1897, as amended in 1901, contained a similar provision in giving this court jurisdiction

upon a bond of a marshal, to wit, "in a case where it is prescribed by a special statutory provision that such an action can be maintained in a District Court, or in said Municipal Court," but such special statutory provision could readily be found in said Charter of 1897, as amended in 1901, the same being section 1428 thereof.

In our fourth edition of this work, published in 1898, after an exhaustive investigation and examination, we wrote a lengthy note upon this subject, coming to the conclusion that no such jurisdiction had been conferred, and it does not seem that the present subdivision has conferred such jurisdiction. See also §§ 178 and 339, and notes.

Jury trial.— If this court has jurisdiction of such an action, it seems a jury trial of twelve men may now be had. Under the provisions of former section 1369 of the Charter of 1897, as amended in 1901, subdivision 8 of section 1364, purporting to give jurisdiction "upon a bastardy or abandonment bond," was excepted thereby from such jury trial. Section 1369 has now been repealed and no disposition has been made of the exception.

5. An action upon the bond of a marshal of the city of New York, as prescribed in this act.

Notes to section 1, subdivision 5.

This subdivision is taken from subdivision 10 of the Charter of 1897, as amended in 1901. It was formerly subdivision 9 of section 1285 of the Consolidation Act (Laws 1882, chap. 410), and subdivision 4 of section 3215 of the Code of Civil Procedure. The former provisions as to the maintenance of this action are annulled and are now provided for in sections 295–300.

Jury trial.— A jury trial of twelve men may now be had. Under the provisions of former section 1369 of the Charter of 1897, as amended in 1901, subdivision 10 of section 1364, giving jurisdiction of an action "upon the bond of a marshal," was excepted from such jury trial. Section 1369 has now been repealed, and no disposition has been made of the exception.

6. An action upon a judgment rendered in any court not being a court of record.

Notes to section 1, subdivision 6.

This subdivision is taken from subdivision 6 of the Charter of 1897, as amended in 1901, and was formerly subdivision 5 of section 1285 of the Consolidation Act (Laws 1882, chap. 410), and subdivision 6 of section 2862 of Code of Civil Procedure.

The provisions as to the maintenance of an action upon a judgment against joint debtors, where one of them has been served, are to be found in sections 264 to 268.

Section 268 provides for an action upon a judgment obtained against joint debtors.

Statute of limitations.— By section 380, Code Civ. Proc., "The following actions must be commenced within the following periods, after the cause of action accrued."

§ 382, Code Civ. Proc. **Within six years.**— Subd. 7. "An action upon a judgment or decree rendered in a court not of record, except where a transcript shall be filed pursuant to section 3017 of this act, and also except a decree in a Surrogate's Court of the State. The cause of action in such a case is deemed to have accrued when final judgment was rendered."

See also *Harris* v. *Clark*, 47 N. Y. St. Rep. 780.

7. An action for a fine or penalty not exceeding five hundred dollars, including an action to recover a penalty given by the charter of the city of New York or any by-law or ordinance thereof or by any statute of the state.

Notes to section 1, subdivision 7.

This subdivision is the same as subdivision 3 of the Charter of 1897, as amended in 1901, without any change. It was taken from subdivision 7 of section 1285 of the Consolidation Act (Laws 1882, chapter 410).

For general provisions respecting "action for a fine, penalty, or forfeiture, or upon a forfeited recognizance," see Code Civ. Proc., §§ 1961–1968.

Building Code.— Violation of penalties of; all courts have jurisdiction. See § 151, Building Code, ordained by Municipal Assembly pursuant to § 647, Greater New York Charter.

Bureau for the recovery of penalties.— By section 259 of the Charter (Laws 1901, chap. 466), such a bureau is created in the law department of the corporation counsel to recover penalties for the violation of any law or municipal ordinance, called the "Bureau for the Recovery of Penalties."

Commissioner of docks.— By section 816 of the charter, the head of the department of docks and ferries is called the commissioner of docks, and by section 827 he is given power to make general ordinances, for a violation of which a penalty of $500 is imposed, recoverable by suit in the name of the city of New York, to be prosecuted by the corporation counsel.

Department of health.— Violations of department orders; action for, and penalties. See § 1262, Greater New York Charter.

Fire commissioner may sue for a penalty in his own name. Charter of 1901, § 731.

Fish poles.— By sections 736 to 739 of the Consolidation Act (Laws 1882, chap. 410), left unaffected by the Charter of 1897, as amended in 1901, a penalty of $5 is imposed for each pole driven for the purpose of fishing where the water is of greater depth than six feet in mean low tide.

Oysters taken out of the Harlem river.— The provisions of the Consolidation Act (Laws 1882, chap. 410, §§ 767, 769, 770), relating to this subject, and the recovery of the $50 penalty for a violation thereof, are left unaffected by the Charter of 1897, as amended in 1901.

Pilots; commissioners.— By section 771 of the Consolidation Act, all fines and penalties incurred under sections 736, 746, 748, 756, 764, and 747 to 783, inclusive, of the Consolidation Act, shall be recoverable by and in the name of the commissioners of pilots.

Section 771 of the Consolidation Act has been left unaffected.

Sections 746, 780, 781, 782 of the Consolidation Act are superseded by the Charter section 880.

Section 748 of the Consolidation Act is superseded by Laws 1882, chapter 160.

Section 756 of the Consolidation Act is affected by section 4653 *et seq.* of the United States Revised Statutes.

Section 764 of the Consolidation Act is affected by section 4178 of the United States Revised Statutes.

Sections 777, 778, and 779 of the Consolidation Act are revised by the Charter sections 851, 852, and 853.

Sections 780, 781, 782, and 783 of the Consolidation Act are revised and superseded by the Charter section 880.

Pilotage fees.— Authorized to be collected whenever a pilot shall be refused by a vessel navigated by steam, to be sued for and recovered in the name of the pilot tendering such service; and such pilotage when recovered shall belong to and may be retained by such pilot for his own use and benefit. § 2134, Cons. Act, as amended by Laws 1890, chap. 191, p. 403. (Unaffected by the Charter.)

Port wardens.— The recovery of $100 penalty for violation of duties as prescribed in section 2090 of the Consolidation Act are unaffected by the Charter of 1897, as amended in 1901.

Steamboats.— By section 757 of the Consolidation Act (unaffected by the Charter of 1897, as amended in 1901), steamboats must run in the center of the river at a speed not exceeding eight miles an hour under a penalty of $250 fine, to be sued for in the name of the people by the district attorney of any county bordering on the waters on which the offense shall have been committed.

Further and other fines and penalties for violations are fixed by various ordinances, statutes, and laws, among others, the size of apple, pear, and potato barrels; refusal to permit a stockholder to inspect stock-books; unlawful possession of milk and cream cans, and the Game Laws, over all of which, and many others, this court has jurisdiction by the broad and general language of this section.

Action where to be brought.— By section 25 of this act, subdivision 5, the action to recover a fine or a penalty must be brought in the district in which the violation happened or occurred.

Indorsement on summons.— In actions to recover a penalty there must be an indorsement on the summons containing a reference to the statute in the form provided by section 38 of this act. See also Code Civ. Proc., § 1897, and *Schumaker* v. *Brooks*, 24 Hun, 553.

8. An action to recover damages for an escape from the jail liberties of any county within the city of New York, where the sum claimed does not exceed five hundred dollars.

Notes to section 1, subdivision 8.

This subdivision was subdivision 9 of the Charter of 1897, as amended in 1901, and has been very materially amended. Prior to 1897 the District Courts had no such jurisdiction, and when it was given to this court by subdivision 6 of section 1364 of the Charter of 1897, the amount was limited to $100, as provided by chapter 2, title 2, articles 4 and 5, sections 145 to 171, of the Code of Civil Procedure, relating to jail liberties, escapes, and actions upon undertakings for jail liberties.

Execution against the person.— A marshal was directed by an execution to satisfy the same out of the debtor's property, and if sufficient property could not be found, to arrest him and commit him to jail, there to remain until he paid the judgment or was lawfully discharged. While the debtor was in the custody of the marshal, the latter was served with an order to show cause why the judgment should not be opened by a temporary stay. He took the prisoner to the courthouse of the district judge, who had departed. The hearing of the motion was adjourned, and the marshal voluntarily allowed the prisoner to go at large. *Held* an escape. Even if the judge had power to grant a stay after final judgment, the one granted did not authorize debtor's discharge. *Zenner* v. *Blessing*, 4 N. Y. Supp. 866.

Liability of bail; debtor insolvent.— On an escape from the liberties of the jail by an execution debtor who is served with summons, and the action on the undertaking begun while he is beyond the jail limits, the surety is liable for the amount of the debt for which the debtor was committed, although the debtor be insolvent. *Flynn* v. *Union Surety & Guaranty Co.*, 61 App. Div. 170, 70 N. Y. Supp. 403.

Liability of officer.— In an action against an officer for the escape of a judgment debtor, against whose person an execution was delivered to defendant, plaintiff must show that the judgment debtor was taken into custody before the alleged escape. *Jackson* v. *Comisky*, 30 Misc. Rep. 622.

Return of prisoner.— The voluntary return of the prisoner after the action is begun does not affect the liability of the surety under section 160 of the Code of Civil Procedure. *Flynn* v. *Union Surety & Guaranty Co.*, 61 App. Div. 170, 70 N. Y. Supp. 403.

9. An action to recover one or more chattels with or without damages for the taking, withholding or detention thereof, where the value of the chattel or of all the chattels as stated in the affidavit made on the part of the plaintiff does not exceed five hundred dollars.

Notes to section 1, subdivision 9.

This subdivision is the same as subdivision 7 of the Charter of 1897, as amended in 1901, and was formerly subdivision 6 of section 1285 of the Consolidation Act, and section 2682 of the Code of Civil Procedure.

Title III, article III, sections 95 to 131, of this act, provides for "Replevin" or the proceedings in an "Action to recover a chattel."

The action of replevin is based upon a tortious act of defendant, and is an action *ex delicto*. *Bernheimer* v. *Hartmayer*, 50 App. Div. 316, 63 N. Y. Supp. 978.

When the action lies.— Plaintiff must have legal title to the property, and though defendants do not prove title in themselves, but in a club, they having interposed a general denial, which put in issue plaintiff's property in the chattels as well as a wrongful detention. *Held*, the plaintiff was not entitled to judgment. *Levy* v. *Kelter*, 63 App. Div. 392, 71 N. Y. Supp. 509. See also *Shapiro* v. *Lankay*, 35 Misc. Rep. 39, 70 N. Y. Supp. 218.

Bankruptcy.— A trustee in bankruptcy may bring an action in this court to recover chattels in which he had an interest at the time the petition was filed. *Franker* v. *McAdam*, 32 Misc. Rep. 512, 66 N. Y. Supp. 379.

Conditional sale.— The plaintiff may recover the goods on default of payment without tendering money received. *Scher* v. *Roher*, 34 Misc. Rep. 792, 69 N. Y. Supp. 929.

The owner of a sewing machine, sold with a condition precedent of payment, is not entitled to maintain an action of replevin, where she is in default as to payments required; nor can she recover damages for

the unlawful detention of the machine where she has not proved any damages, but merely the value of the machine. *Iserman* v. *Conklin*, 21 Misc. Rep. 194. See also *Hemstreet* v. *Henley*, 21 Misc. Rep. 426.

Custody and control.— An action of replevin is not maintainable against the fraudulent buyer of goods where, prior to the demand for their return, and before the commencement of the action, they were taken from defendant on execution against him and sold, so that, at the time of such demand and commencement of the action, they were not in the defendant's custody or control. *Sinnott* v. *Felack*, 165 N. Y. 444.

The rule is that replevin is essentially a possessory action which can only be maintained where the defendant is in possession of the chattels at the time of the commencement of the action *excepting only where he has voluntarily parted with the property*. *Sinnott* v. *Felack*, 165 N. Y. 444.

Damages.— *It seems* that while jurisdiction in actions of replevin is restricted to cases in which the value of the chattel shall not exceed $500, there is no limitation upon the amount of damages which may therein be awarded. *Barnard* v. *Devine*, 34 Misc. Rep. 182, 68 N. Y. Supp. 859.

Fraud.— Where property has been acquired fraudulently, under circumstances which would entitle the vendor to reclaim the same, and the seller has sold it with intent to perfect the fraud, and put it beyond the reach of the seller, an action to recover the same lies, though the property is no longer in the defendant's possession. *Barnett* v. *Selling*, 70 N. Y. 492; s. c., 9 Hun, 236.

An action for a chattel will lie against a person receiving it, with knowledge, from a fraudulent vendee, although he had parted with the chattel before the action was commenced. *Meacham* v. *Collignon*, 7 Daly, 402.

Interest in property.— Where the owner of a hotel leases the hotel property, leaving whisky, which is part of his stock in trade, in the possession of the lessees under an agreement that the latter should retail it over their bar and pay him for what they so used, the lessees have an interest in the whisky which is subject to seizure and sale under execution. In an action of replevin the plaintiff is not entitled to recover as damages the value of the legal services rendered in the premises to him by his attorney prior to the commencement of the action. *Cook* v. *Gross*, 60 App. Div. 446.

Mingling goods.— In an action to recover grain, where the defendant had mixed his own grain with that of the plaintiff, *held*, that it was a case of confusion of goods, and, as the grain could not be separated, the defendant could not thus defeat the action, and must bear the loss. *Samson* v. *Rose*, 65 N. Y. 411.

Money.— Replevin will not lie for money unless belonging to plaintiff specifically and so described. *Sager* v. *Blain*, 44 N. Y. 445.

No title.— So the action lies against one who has sold the goods having innocently purchased from one having no title. *Ross* v. *Cassidy*, 27 How. Pr. 411.

Offer to restore property.— The object of the proceeding is the recovery of the property; and if, before the action is brought, the defendant offers to restore the property, the object is attained, and the proceeding is unnecessary. The offer is the same as a tender before action brought. *Savage* v. *Perkins*, 11 How. Pr. 17.

Possession.— The owner may maintain replevin if a chattel is taken from his actual or constructive possession. *Ely* v. *Ehle*, 3 N. Y. 506.

An action can be maintained in favor of a plaintiff who has either the title to the property or the right of its immediate possession; both need not be combined. *Davis* v. *Morrell*, 16 Week. Dig. 530; *Savell* v. *Wauful*, 21 Civ. Proc. Rep. 18, 16 N. Y. Supp. 219. See also *Appleby* v. *Hollands*, 8 App. Div. 375; *Wheeler* v. *Vandercer*, 88 Hun, 233.

Replevin will lie, although the defendant has parted with the possession of the property, and it has passed beyond the reach of the process of the court. *Barnett* v. *Selling*, 3 Abb. N. C. 83; s. c., 9 Hun, 236; affd., 70 N. Y. 492; *Boyd* v. *Howden*, 3 Daly, 455. See *Sinnott* v. *Felack*, 165 N. Y. 444.

The owner of a chattel may in general replevy it from any person who has it in his possession and who has no right to retain it as against him. *Read* v. *Brayton*, 143 N. Y. 342. See also *National Bank, etc.* v. *Rogers*, 1 App. Div. 625; *Hoffman* v. *Markham*, 88 Hun, 18.

Promissory notes and checks.— In order to enable the plaintiff to maintain an action for the recovery of promissory notes, a title to the note must be shown: a right to their proceeds will not suffice. *Black River Ins. Co.* v. *N. Y. S. Loan & T. Co.*, 73 N. Y. 282.

A note delivered by plaintiff to defendant, upon his stipulation not to part with it, may be recovered, although defendant has pledged it as collateral security for an indebtedness owing to him. *Etrell* v. *De Pennevet*, 14 Civ. Proc. Rep. 336.

Where, by the contract of sale, the property is forfeited for nonpayment of the purchase money, and the plaintiff, after a demand, takes the defendant's check for the amount due, and the check is not paid,— *Held*, that the action would not lie, without the return of the check and a new demand. *Smith* v. *Newland*, 9 Hun, 553.

The action will not lie for a check after it has been presented to and paid by the drawee, and returned as a voucher to the drawer. *Smith* v. *Newland*, 9 Hun, 553.

Property accidentally destroyed.— There is no liability where goods came lawfully into defendant's possession and were accidentally

destroyed. *Salt Springs N. B. v. Wheeler*, 48 N. Y. 492. And see *Dexter v. Dexter*, 56 N. Y. Super. 568.

Property out of the county.— This court has jurisdiction of an action of claim and delivery unlawfully taken and detained in another county. *Boyd v. Howden*, 3 Daly, 455; *Luban v. Simaids*, 46 App. Div. 192, 61 N. Y. Supp. 697; *Barnett v. Selling*, 3 Abb. N. C. 83; s. c., 9 Hun, 236; aff'd., 70 N. Y. 492.

Sheriff; action against.— This court has jurisdiction of actions against the sheriff to recover property alleged to have been wrongfully seized by him. *Price v. Grant*, 15 Daly, 436; s. c., 28 N. Y. 422, 7 N. Y. Supp. 904; *Stoutenburg v. Jansen*, 9 Johns. 369.

Special property; value of the chattel.— In an action for a chattel, where the plaintiff has a special property in the chattel, the value of the special property is regarded as the value of the chattel for the purpose of determining the jurisdiction of the court. *Shea v. Smith*, 12 Week. Dig. 252.

Surety may continue action.— A surety upon an undertaking in replevin may prosecute the action brought by the principal after the latter had abandoned it. *Hoffman v. Steinau*, 34 Hun, 239.

Tenants in common.— The action will not lie in favor of one tenant in common of a chattel, against the other tenant and a purchaser from him, although the plaintiff's cotenant has delivered the chattel to the third person. *Hudson v. Swan*, 83 N. Y. 552, revg. s. c., 7 Abb. N. C. 324.

Value; special interest.— In an action for claim and delivery of personal property, the special interest of the plaintiff is regarded as the value, so as to give jurisdiction. *Shea v. Smith*, 12 Week. Dig. 254.

Wife's property.— A wife living apart from her husband may, after demand and refusal, maintain the action to recover her personal property, which remained in the husband's house when she left it. *Howland v. Howland*, 20 Hun, 472.

A levy by a sheriff, holding an execution against a husband, upon the wife's property, is such an act of dominion over it as will sustain replevin, although there was no actual removal, and the sheriff claimed to levy upon, and advertise only, the husband's interest in the property, he having in fact no interest. *Alvord v. Haynes*, 13 Hun, 26.

A cartman who takes and delivers to the husband property of the wife from the room occupied by them is liable to her in replevin. *Mead v. Jack*, 16 Week. Dig. 403.

10. An action to foreclose a lien upon a chattel for a sum of money, in any case where such a lien exists at the commencement of the action and where the amount of the lien does not exceed five hundred dollars.

Notes to section 1, subdivision 10.

By section 1285, subdivision 10, of the Consolidation Act (Laws 1882, chap. 410), jurisdiction of an "action to foreclose a lien upon a chattel" had been expressly given to the District Courts, but the provision was omitted from the Charter of 1897, as amended in 1901. It seems however that by sections 1737 and 3215 of the Code of Civil Procedure, the District Courts and this court nevertheless had such jurisdiction. Such jurisdiction is now expressly conferred by this subdivision. The procedure in an "action to foreclose a lien on a chattel" are to be found in sections 137 to 142. The provisions of this subdivision are substantially reiterated in section 137.

Animals, wagon, etc., or harness; lien of bailee.— A person keeping a livery-stable, or boarding-stable for animals, or pasturing or boarding one or more animals, or who in connection therewith keeps or stores any wagon, truck, cart, carriage, vehicle, or harness, has a lien dependent upon the possession upon each animal kept, pastured, or boarded by him, and upon any wagon, truck, cart, carriage, vehicle, or harness, of any kind or description, stored or kept, under an agreement with the owner thereof, whether such owner be a mortgagor remaining in possession or otherwise, for the sum due him for the care, keeping, boarding, or pasturing of the animal, or for the keeping or storing of any wagon, truck, cart, carriage, vehicle, and harness, under the agreement, and may detain the animal or wagon, truck, cart, carriage, vehicle, and harness accordingly, until such sum is paid. Laws 1899, chap. 465, p. 942. See *Cotta* v. *Carr*, 27 Misc. Rep. 245; *Lessels* v. *Farnsworth*, 13 Daly, 473; *Gorman* v. *Williams*, 26 Misc. Rep. 776.

Artisan's lien on personal property.— A person who makes, alters, repairs, or in any way enhances the value of an article of personal property, at the request, or with the consent of the owner, has a lien on such article, while lawfully in possession thereof, for his reasonable charges for the work done and materials furnished, and may retain possession thereof until such charges are paid. Laws 1897, chap. 418, § 70, an act in relation to liens, constituting chap. 49 of the General Laws. *O'Claire* v. *Hale*, 35 App. Div. 77; *Wiles Laundering Co.* v. *Hahlo*, 105 N. Y. 234.

Bailment; lien.— Plaintiff delivered certain carriages to defendant to be repaired. When the repairs were partly done plaintiff demanded their return in the condition they then were, but made no tender of the amount due for the repairs already made. This demand was refused, as plaintiff and his witness testify, unless a previous bill was paid, which was denied by one of the defendants and the testimony of defendant's attorney who offered to deliver the carriage on payment of the bill for services and material bestowed on them. *Held*, that a decision in favor of defendants would not be disturbed. After the demand the defendants completed the repairs. *Held*, that this work

was authorized by the contract entered into on the delivery of the carriages to them, and that defendants had a lien on the carriages for such repairs. *Shailer, Recr.* v. *Corbett et al.*, 40 N. Y. St. Rep. 786.

Boarding-house keeper; who is?— The statute is only designed to protect a class of persons which makes the keeping of boarders a business or calling, in whole or in part. It is not every private house where one or more boarders are kept occasionally only, and upon special considerations. It is a *quasi*-public house, where boarders are generally and habitually kept, and which is held such, and known as a place of entertainment of that kind. The boarding-house-keeper is not bound to receive any one, except upon special contract. A housekeeper, not accustomed to take persons to board, receiving a person and his family into his house for an indefinite time, with the understanding that he was to be paid for the board and accommodations, is not a boarding-house-keeper allowing a detention of the baggage and effects of boarders for board due. *Cady* v. *McDowell*, 1 Lans. 484.

Extent and limit of boarding-house keeper's lien.— The intent of the statute, giving to the keeper of a boarding-house a lien to the extent of the board due, is to give them the same lien which an innkeeper has upon the effects of a guest, without reference to the character of the guests, whether they are *transient* or *permanent* boarders. *Stewart* v. *McCready*, 24 How. Pr. 62. And see *Cady* v. *McDowell*, 1 Lans. 484.

It extends to property of a guest *which is exempt from levy and sale on execution*. *Thorn* v. *Whitbeck*, 11 Misc. Rep. 175.

The limit of the lien is for board actually due, and not including board to become due under an arrangement to board in future, nor can it be extended to any other indebtedness, nor to any demand not due at the time of the detention. *Shafer* v. *Guest*, 35 How. Pr. 184; s. c., 6 Robt. 264.

Boarding-house keeper not to have lien when he had notice that property was not the property of the guest. Laws 1899, chap. 380, p. 834.

Wife's wearing apparel, or separate property, cannot be detained by a boarding-house-keeper for board owing by the husband for herself and family. *McIlvaine* v. *Hilton*, 7 Hun, 594.

Book accountants employed to examine books of account have no lien upon the books for their services. *Scott Shoe Machinery Co.* v. *Broaker*, 35 Misc. Rep. 382.

Carriages and other vehicles when sold conditionally are exempt from lien. Laws 1898, chap. 354, p. 1019, amending Laws 1897, chap. 418, § 115.

Choses in action.— This subdivision is taken from sections 1737, 3215, subdivision 1 of the Code of Civil Procedure, and section 1285, subdivision 10, Consolidation Act, and applies to chattels and not to mere choses in action. *Matter of Wilson*, 2 Civ. Proc. Rep. 343.

Common law liens, embracing, "1. A brief review of the common law on the subject of liens; 2. Liens of various bailees under the common

law; 3. Lien of the warehouseman and the wharfinger's lien before the statute," will be found in *Stallman* v. *Kimberly*, 23 Abb. N. C. 245. See also *Buffalo Dry Dock Co.* v. *Ludenburg*, 19 App. Div. 39.

When a lien exists.— A lien exists either by express agreement of the parties, or is implied from their mode of dealing, or it follows from the established usage of trade, or it is founded upon the immemorial recognition by the common law of a right to it in special cases. *It seems* the lien is recognized in the case of every bailee for hire who takes property in the way of his trade and occupation, and by his labor and skill imparts additional value to it. *Trust* v. *Pirsson*, 1 Hilt. 292.

When a lien does not exist.— If a special agreement for a particular mode of payment, or for payment at a future period, is made in any case in which a right of lien would otherwise be implied, the lien does not exist. If such an agreement is made before the claimant acquires possession of the chattel no lien is created; if made thereafter it is a waiver of the lien. *Trust* v. *Pirsson*, 1 Hilt. 292.

When lien is and is not defeated.— As between the debtor and creditor however the lien is not defeated by loss of possession, unless the creditor voluntarily parted with possession, intending to abandon the lien. *Allen* v. *Spencer*, 1 Edm. 117; *Kafka* v. *Levensohn*, 18 Misc. Rep. 202, 41 N. Y. Supp. 368.

Conditional sales; exemption from lien law.— By Laws 1898, chap. 354, p. 1019, amending section 115 of the Lien Law of 1897 (chap. 418), conditional sales of household goods, law books, law blanks, and law office supplies, pianos, organs, safes, scales, butcher's and meat market tools and fixtures, wood-cutting machinery, engines, dynamos, boilers, portable furnaces, boilers for heating purposes, threshing machines, horse powers, mowing machines, reapers, harvesters, graindrills and attachments, dairy sizes of centrifugal cream separators, coaches, hearses, carriages, buggies, phætons, and other vehicles, bicycles, tricycles, and other devices for locomotion by human power, if the contract for the sale thereof is executed in duplicate, and one duplicate delivered to the purchaser, do not apply to the Lien Law, and are exempt therefrom.

Discharge of lien.— If the mechanic makes agreement with owner of chattel upon which he has a lien for services to look to a third party for his pay, the lien is discharged. *Bailey* v. *Adams*, 14 Wend. 201. Compare *Fielding* v. *Mills*, 2 Bosw. 489; *Gorman* v. *Williams*, 26 Misc. Rep. 776.

A tender of the debt, and demand for the delivery of the chattel, discharges the lien thereon. *La Motte* v. *Archer*, 4 E. D. Smith. 46. Compare *Everett* v. *Coffin*, 6 Wend. 603; *Hoyt* v. *Sprague*, 61 Barb. 497.

Hotel, inn, boarding and lodging-house keepers; liens.— A keeper of a hotel, inn, boarding-house, or lodging-house, except an emigrant lodging-house, has a lien upon, while in possession, and may detain the baggage, and other property brought upon their premises by a guest, boarder, or lodger, for the proper charges due from him, on account of his accommodation, board, and lodging, and such extras as are furnished at his request. If the keeper of such hotel, inn, boarding, or lodging-house knew that the property so brought upon his premises was not, when brought, legally in possession of such guest, boarder, or lodger, or had notice that such property was not then the property of such guest, boarder or lodger, a lien therefor does not exist. Laws 1899, chap. 380, p. 834. See *Grinnell* v. *Cook*, 3 Hill, 485; *Smith* v. *Keyes*, 2 T. & C. 650.

Law books, law blanks and law office supplies when sold *conditionally* was exempt from a lien. Laws 1898, chap. 354, p. 1019, amending Lien Law of 1897 (chap. 418), § 115.

Livery-stable-keeper's lien; agreement.— Under an agreement between plaintiffs and defendant that the latter should take care of plaintiff's horse, wagon, and harness, and they were to have possession and use of the same in their business every day, defendant boarded the horse, and cared for the property. *Held*, that defendant had no lien for the value of the keeping. *Cotta* v. *Carr*, 27 Misc. Rep. 545.

The bailee of a horse to use for its keeping, made an arrangement with a livery-stable-keeper without authority of the owner for the keeping of this and another horse, and thereafter agreed that the stable-keeper should retain the horse so bailed, as security for his charges. *Held*, that the owner was entitled to the possession of the horse. *Hassett* v. *Sanborn*, 62 App. Div. 588.

It seems that the livery-stable-keeper had no lien under Laws 1897, chap. 418, section 74, for the reason the keeping was not furnished "under an agreement with the owner." *Hassett* v. *Sanborn*, 62 App. Div. 588.

Id.; discharge.— *It seems* that acceptance of the liability of a new owner, ignorant of the existence of a lien, and turning over the property to his use, discharges the lien of a stable-keeper on a horse and wagon, though they remain in his stable. *Gorman* v. *Williams*, 26 Misc. Rep. 776.

It seems that acceptance of the note of a third person for the liability waives the stable-keeper's lien. *Gorman* v. *Williams*, 26 Misc. Rep. 776.

Id.; extent of lien; tender.— The lien of a livery-stable-keeper does not extend to secure other claims than those on the property in his custody; and on being called upon by an assignee of the property, who desires to pay the lien, to state the amount due, if he demands a sum largely in excess thereof, not disclosing the amount of the lien, the

assignee is not obliged to make a tender of it before bringing suit for the recovery of the property. *Allen* v. *Corby*, 59 App. Div. 1.

Id.; notice.— Where plaintiff claimed a stable-keeper's lien on account of a horse bought from a third person by defendant but which she had notified plaintiff she did not own, having annulled the sale, and he must look to the seller for his pay, and plaintiff sought to enforce his lien against three horses, including two which defendant owned,— *Held*, that the notice imposed upon the stable-keeper the duty of enforcing his lien within a reasonable time, or otherwise asserting his right, and it was error to charge that the notice did not terminate defendant's liability for the keep of the horse. *Mason Stable Co.* v. *Lewis*, 16 Misc. Rep. 359, 74 N. Y. St. Rep. 379, 38 N. Y. Supp. 82.

While possession of the animal by the livery-stable-keeper is not essential to his security where it has been removed from his stable by fraud, he must give the statutory written notice to the owner required, within a reasonable time, in order to perfect his inchoate lien, and without such notice he cannot regain possession of the animal by replevin. *Kline* v. *Green*, 83 Hun, 190; s. c., 64 N. Y. St. Rep. 153, 31 N. Y. Supp. 599.

Notice so given relates back to the time of a demand made upon him by the owner for the animal. *Kline* v. *Green*, 83 Hun, 190; s. c., 64 N. Y. St. Rep. 153, 31 N. Y. Supp. 599.

Monuments, tombstones.— The lien which was given upon a tombstone for the unpaid price by Laws 1888, chap. 543, has been declared unconstitutional. *Brooks* v. *Tayntor*, 17 Misc. Rep. 534, 40 N. Y. Supp. 445. And said statute has been repealed by Laws 1897, chap. 418.

Duration of such liens.— The statute relating to liens on monuments and cemetery structures does not contain any provision for extending the duration of such liens, as may be done by judicial order in the case of mechanics' liens, by virtue of Laws 1897, chap. 418, § 16; the notice must be filed with the superintendent or person in charge of the cemetery, and within one year after the agreed price became due, and cannot be thereafter filed *nunc pro tunc* under an order of the court. *Adler* v. *Lumley*, 46 App. Div. 229.

Newspaper.— *An agent* who made a loan to a newspaper, and was to solicit advertisements for it, and repay himself out of the proceeds to a specified amount each month,— *Held*, to have no lien upon the proceeds as against a receiver of the corporation. *Commercial Publishing Co.* v. *Beckwith*, 36 App. Div. 629.

Piano or organ sold *conditionally* is exempt from lien. Laws 1898, chap. 354, p. 1019, amending Lien Law of 1897, chap. 418, § 115.

Private storage.— There is no lien in favor of one giving private storage of goods. *Merritt* v. *Peirano*, 10 App. Div. 563; s. c., 42 N. Y. Supp. 97. See however *The Buffalo Dry Dock Co.* v. *Ladenburg*, 19 App. Div. 35.

Safe sold *conditionally* is exempt from lien. Laws 1898, chap. 354, p. 1019, amending Lien Law of 1897, chap. 418, § 115.

Sales of property to satisfy liens.— As to the notice of sale required to be given to the owner, and the advertisement of the sale, see Laws 1899, chap. 369, p. 793.

Stallions; liens for service of.— Amended Laws 1902, chap. 351.

Statutory liens.— General Lien Law of 1897, chap. 418, as amended by Laws 1898, chap. 354, and Laws 1899, chap. 369, §§ 81 and 82, p. 793, chap. 380, § 71, p. 834, and chap. 465, § 74, p. 942, are acts in relation to all liens now allowed by statutory law upon chattels.

Storage enforcement.— The bailee of household goods for storage has no right to sell the same for unpaid charges without notice to the owner of the goods, and the requirements of Laws 1899, chap. 369, amending Laws 1897, chap. 418, § 81, must be complied with. *Robinson* v. *Wappans*, 34 Misc. Rep. 199.

Warehouse liens.— See Laws 1897, chap. 418, § 73. (See *Sage* v. *Gittner*, 11 Barb. 120; *Stallman* v. *Kimberly*, 53 Hun, 531; *Bauman* v. *Jefferson*, 4 Misc. Rep. 147; *The Buffalo Dry Dock Co.* v. *Ladenburg*, 19 App. Div. 35.

Warehouseman.— A mere volunteer, under no obligation as a warehouseman, who receives the temporary custody of chattels, has no lien upon them for storage, in the absence of any agreement, though he may be entitled to compensation for caring for them, as upon a *quantum meruit*. *Lyungstrandt* v. *William Haaker Co.*, 16 Misc. Rep. 387, 73 N. Y. St. Rep. 808, 38 N. Y. Supp. 129.

Workingman's lien.— Workman repairing chattel necessary for its preservation, has such a lien for his charges that he may retain possession of the chattel, even against a prior mortgagee. *Scott* v. *Delahunt*, 5 Lans. 372.

Unless the property has been enhanced in value by the work done, no lien can be acquired thereon, unless by special contract. *De Vinne* v. *Rianhard*, 9 Daly, 406.

A workman employed to take away materials and manufacture clothing from them has a lien upon them for his work, and may detain them until the lien is discharged. *Kafka* v. *Levensohn*, 18 Misc. Rep. 202, 41 N. Y. Supp. 368.

Where part of the goods are stolen from him without his fault, his lien attaches to the residue in his hands for the work done thereon. *Kafka* v. *Levensohn*, 18 Misc. Rep. 202, 41 N. Y. Supp. 368.

11. An action to enforce a mechanic's lien on real property in which the court shall have power to render judgment for the sum due, and to declare the amount a valid lien against the interest of the defendant in the property described in the

complaint, at the time of the filing of the lien, where the amount does not exceed five hundred dollars, but said court cannot render judgment for the foreclosure and sale of the property.

Notes to section 1, subdivision 11.

This subdivision was not contained in the Charter of 1897, as amended in 1901, but this court had jurisdiction to enforce mechanics' liens as provided by Laws 1897, chap. 419, which was an amendment to the Code of Civil Procedure, by adding a new chapter and also sections 3399, 3404 to 3414.

There are no provisions for any particular procedure to enforce a mechanic's lien prescribed in this act. Formerly the return day in such a case was not less than twelve nor more than twenty days, and service by publication was provided for by Code Civ. Proc., §§ 3404, 3405, and 3406, which sections were added to said Code by Laws 1897, chap. 419, p. 547, and remain unrepealed, but they have been doubtless superseded by the provisions of this act, sections 32, 33, 34, 37, and others leaving the practice in such action the same as in any other action in this court.

Proceedings for the enforcement of mechanics' liens on real property are to be found in Code Civ. Proc., tit. III, added by Laws 1897, chap. 419, §§ 3398 to 3419, and include "Action in a court not of record."

Complaint in mechanic's lien action; requisites of, are prescribed in Code Civ. Proc., § 3404, added to said Code by Laws 1897, chap. 419, p. 546, left unrepealed by this act. These requisites are as follows: The complaint must set forth substantially the facts contained in the notice of lien, and the substance of the agreement under which the labor was performed or the materials were furnished.

Costs and disbursements same as allowed in other actions in this court. Code Civ. Proc., § 3411.

Equitable action.— This court has jurisdiction. The provisions of the Mechanics' Lien Law in courts not of record regulating the procedure are entirely different from that of this court. In this court there can only be recovery of a money judgment and for the issuing of an execution to sell the title and interest of the owner in the premises, and not the property itself. *Kotzen* v. *Nathanson*, 33 Misc. Rep. 299, followed in *Eadie* v. *Waldron*, 64 App. Div. 424.

Judgment; execution; sale.— Although this court cannot render judgment for the foreclosure and sale of the property, it can sell the right, title, and interest of the owner in the premises, upon which the lien set forth in the complaint existed at the time of filing the notice of lien. Code Civ. Proc., § 3408.

Trial is the same as other issues triable in this court. Code Civ. Proc., § 3407.

12. A summary proceeding under title two of chapter seventeen of the code of civil procedure to recover possession of real property which, or a portion of which, is situated within the district wherein the application for such recovery is made. Such proceeding may be tried with or without a jury, which may be demanded by any party thereto. The court in either case has power upon application, to allow the petition or answer to be amended, at any time, if substantial justice will be promoted thereby and the rights of the parties have not been impaired by reason of the defective pleading, to direct or set aside a verdict, and to grant or deny a motion for a new trial, and an appeal may be taken therefrom.

Notes to section 1, subdivision 12.

This subdivision is the same as section 12 in the Charter of 1897, as amended in 1901, with the addition of powers to set aside a verdict, or to grant or deny a new trial, and allowing an appeal. It was formerly a part of section 1357 of the Consolidation Act (Laws 1882, chap. 410), which was superseded by subdivision 12 of section 1364 of the Charter of 1897, and was continued in force in and by sections 1369 and 1428 of said Charter.

Sections 1357, 1358, 1359, and 1360 of the Consolidation Act relating to "Summary Proceedings," were all repealed by this act, and subdivision 12 of section 1 thereof enacted in their place and stead.

By chapter 17 of the Code of Civil Procedure, entitled "Certain Special Proceedings Instituted without Writ," these proceedings are "Special Proceedings." See §§ 3334 and 3343, subd. 20, and § 1688 of said Code.

Title II of chapter 17 of the Code of Civil Procedure, mentioned in this section is entitled "Summary Proceedings to Recover the Possession of Real Property," and is embraced within section 2231 to section 2265, both inclusive. These sections contain the law and practice relating to summary proceedings for nonpayment of rent and for holding over after a tenant's term expires; to the removal of a person holding over after land has been sold; to the removal of a person occupying and using property as a bawdy-house or house of assignation for lewd persons, and to forcible entry and detainer proceedings.

The law and practice in these "Special Proceedings" requires a work in itself, especially as it is composed of an entire title, containing thirty-five sections of the Code of Civil Procedure. We have therefore deemed it impracticable to make further provisions in this as in former editions, leaving the practitioner to "McAdam's Landlord and Tenant," vol. 3, "Summary Proceedings to Recover the Possession of

Lands and Tenements within the State of New York, with Forms; " and to his preceding works on this subject, which are a lasting monument to the legal learning and ability of this gifted and lamented lawyer and judge.

Court may direct verdict; when. See § 252.

Motion to set aside verdict, or vacate or amend judgment. See § 254.

13. An action for damages for fraud or deceit where the damages claimed do not exceed five hundred dollars.

Notes to section 1, subdivision 13.

No explanatory or other reference is made to this subdivision by the commissioners who drew this act and reported it to the Legislature. It is the same as subdivision 11 of the Charter of 1897, as amended in 1901, with a very important exception. The former subdivision limited the action to fraud or deceit about " personal property," which limitation is eliminated from the present action, thus leaving it applicable to an action for fraud and deceit about *real property*.

Prior to the Charter of 1897, section 1364, subdivision 11, the District Courts had no jurisdiction in an action for fraud or deceit. *Vide*, § 1285, subds. 1 to 13, Consolidation Act (Laws 1882, chap. 410).

Agent and principal are jointly liable for the agent's deceit and fraudulent representations. *Cunningham* v. *Wathen*, 14 App. Div. 553.

Checks drawn without funds to meet them.— One who draws a check on a bank where he has no funds to meet it is guilty of a fraud on the person who parts with money on the faith thereof. *Sieling* v. *Clark*, 18 Misc. Rep. 464.

Id.; withdrawal of deposit.— If the drawer of a check withdraws funds which he had in the drawee's hands when he drew the check, and thereby defeats its payment, he commits a fraud on the holder. *Sieling* v. *Clark*, 18 Misc. Rep. 464.

Deceit; when action lies.— An action for deceit will not lie against a buyer of goods who has falsely stated his financial condition to a mercantile agency, at the suit of the seller who relied upon the rating given to the buyer by the agency, unless the false statements themselves were in some way communicated to the seller and he made the sale relying upon them. *Tindle* v. *Birkett*, 57 App. Div. 450.

If a firm of buyers represented the facts stated by them to be true to their personal knowledge, with a view of inducing the sellers to believe them, and they were believed, relied upon, and acted upon by the sellers, and the statements were not true, the buyers are chargeable with deceit precisely as if the statements were made with knowledge of their falsity. *Schoeman* v. *Chamberlin*, 55 App. Div. 351.

Elements of fraud.— The elements of an action for fraud are representations of falsity, *scienter*, deception, and injury. *Wessels* v. *Carr*, 15 App. Div. 360.

Evidence of fraud.— In an action to recover goods whose sale was alleged to have been procured by false representations of solvency, evidence of transactions of the vendees with their creditors before and after the sale by plaintiffs and up to the time of failure is admissible to show the existence of a general scheme of fraud. *Summer* v. *Oppenheim*. 19 Misc. Rep. 605, 606.

False representations; what must be shown.— In an action for an installment of rent, defendant interposed a counterclaim alleging that plaintiff, to induce defendant to make the lease at the rental of $12,000 a year, represented that the previous tenant had paid that sum; that such representations were false, and were known to plaintiff to be false; that defendant relied upon them and was deceived by them, and asked that the lease shall be canceled and delivered up. *Held*, that to entitle defendant to recover upon its counterclaim it was necessary for it to establish the representations made; their falsity; the knowledge of their falsity; the intention to deceive, and the fact that the defendant relied upon them and that it suffered damage thereby. *Powell* v. *Linde Co.*, 58 App. Div. 261, 68 N. Y. Supp. 1070; appeal dismissed in 167 N. Y. 617; *Brackett* v. *Griswold*, 112 N. Y. 454. See also *Chisholm* v. *Eisenhuth*, 69 App. Div. 134.

Misrepresentation.— A misrepresentation to become the basis of fraud must be of an existing fact, and not a promise. *Wheeler* v. *Mowers*, 16 Misc. Rep. 143; s. c., 38 N. Y. Supp. 950.

A "misrepresentation with intent to deceive" is the equivalent of actual fraud, and a mistake or innocent misrepresentation is enough to justify a rescission of the contract made in reliance upon it. *Foster* v. *Wilhusen*, 14 Misc. Rep. 520; s. c., 70 N. Y. St. Rep. 701, 35 N. Y. Supp. 1083.

Promise.— The failure on the part of a lessor to make promised improvements is not a fraud. *Lynch* v. *Sauer*, 16 Misc. Rep. 1; s. c., 73 N. Y. St. Rep. 269, 37 N. Y. Supp. 666.

Proof of fraud.— A charge of fraud in a civil action, although in the nature of a crime, need not be proved beyond a reasonable doubt, but may be established by facts necessarily tending to establish probability of guilt. *Summers* v. *Oppenheim*, 19 Misc. Rep. 605.

A person charged with making false representations, who admits that the representations charged to have been made were made, is not bound to prove them to be true. The fact that statements are made by one party and assented to by the other, and that both parties are mistaken, does not establish an intent to falsify on the part of the party making the statements, especially where there are an estimate of the cost of work to be done. *Sterling* v. *Boll*, 10 App. Div. 290.

False representations as to the incumbrances upon goods sold cannot be proved by testimony of witness as to statements as to indebtedness made to him by the bookkeeper of the alleged creditor. *Gage* v. *Peetsch*, 19 Misc. Rep. 369.

Proof of knowledge.— A complaint alleging that to induce plaintiff to purchase a horse defendant falsely and fraudulently represented it worth $120, and warranted it sound and free from disease; that it was not sound and not worth that price, but had a disease well known to defendant, is an action for deceit, and the defendant's knowledge of the alleged unsoundness must be proved. A recovery cannot be had without such proof, by construing the complaint as one for a false warranty. *Moore* v. *Noble*, 36 How. Pr. 385; s. c., 53 Barb. 425.

Relation of parties.— The presumption of undue influence, or unfairness arising from the confidential relations of the parties to a contract, does not arise from the ordinary and friendly relations between relatives intimately associated in business affairs. The question as to parties so situated is one of fact depending upon the circumstances in each case. *Doheny* v. *Lacy*, 168 N. Y. 213, 61 N. E. 255, affg. 42 App. Div. 218.

Remedies against fraud.— A vendee upon discovery of a fraud in the sale may elect to cancel the contract and recover back the purchase price, or the value of the property taken or lost to him by reason of the alleged fraud. *Gage* v. *Peetseh*, 19 Misc. Rep. 369.

A person who has been induced by fraudulent representations to become the purchaser of property has, upon discovery of the fraud, three remedies open to him. First, he may rescind the contract absolutely and sue to recover the consideration, in which case he must first restore or offer to restore the property; second, he may bring action to rescind; third, he may retain what he has received and bring an action at law to recover the damages sustained, in which case the measure of his recovery is the difference between the value of the article sold and what it should be according to the representations. *Grosjean* v. *Galloway*, 64 App. Div. 547.

Fraudulent sale.— Where a sale upon credit is induced by representations of the buyer, the seller has the right either to disaffirm the sale and recover back the goods or to waive the tort and proceed at once for the purchase price, affirming the sale but disaffirming the credit, and an offer of the buyer to return the goods upon receipt of his note given for the price will not bar the latter action. *Heilbronn* v. *Herzog*, 165 N. Y. 98, 58 N. E. 759.

14. An action to recover damages for a personal injury, or for loss of services or for medical or other necessary expenses occasioned thereby, or an injury to property, where the sum claimed does not exceed five hundred dollars, excepting however, actions to recover damages for an assault, battery, malicious prosecution, false imprisonment, libel, slander, criminal conversation, seduction, or loss of society of husband or wife.

Notes to section 1, subdivision 14.

This subdivision enlarges the jurisdiction in actions for damages for personal injuries to actions for loss of services, or for medical or other necessary expenses occasioned thereby.

It is taken from subdivision 2 of section 1364 of the Charter of 1897, as amended in 1901, and is substantially similar except as stated. Formerly it was subdivision 2 of section 1285 of the Consolidation Act (Laws 1882, chap. 410), and as amended by the Charter of 1897, the nonjurisdictional subdivision 2 of section 1286 of the Consolidation Act was added to it.

Personal injury is defined by section 3343, subdivision 9 of the Code of Civil Procedure, of all of which this court has not jurisdiction, except of those meant by the last line, reading, "or other actionable injury to the person, either of the plaintiff or of another."

Injury to property is defined by section 3343, subdivision 10 of the Code of Civil Procedure: "An 'injury to property' is an actionable act, whereby the estate of another is lessened, other than a personal injury, or the breach of a contract."

Abuse of horse.— In an action for damages for abuse of a horse, which defendant hired, and returned next day in a dying condition,—*Held*, that a direction of a verdict for defendant should be reversed. *Whalen v. N. Y. & Staten Island Electric Co.*, 63 App. Div. 615.

Careless driving.— The act of the driver of defendant's carriage, standing on the west side of the street with the horses toward the south, in suddenly turning so as to go north on the same side of the street, instead of moving down and crossing over to the east side to go north, and the conduct of plaintiff coming south on a bicycle at the rate of five or six miles an hour, ringing his bell, and struck by the pole of the carriage. *Held* to present question of fact for the jury. *Hill v. Moebus*, 56 App. Div. 354.

Collision between car and vehicle.— Dismissal of the complaint in an action for damages against a street railroad company, whose car ran into plaintiff's wagon as he was attempting to cross the railroad track, he having started to do so when the car was nearly a block away. *Held* error. *Ludecke v. Metropolitan Street Ry. Co.*, 32 Misc. Rep. 635.

Contributory negligence.— Whether or not a plaintiff is guilty of contributory negligence, as a general proposition, is a question of fact to be determined by the jury, and it is only where it clearly appears from the uncontradicted evidence that the plaintiff has by his own act contributed to the injury he has received, that the court is justified in determining that question as one of law. *Cohen v. Metropolitan Street Ry. Co.*, 63 App. Div. 165.

Crossing street.— A girl thirteen years old, struck by a horse car as she crossed an avenue after waiting for a covered wagon to pass, without thereafter looking for the approach of a car though she had looked

before the wagon passed,—*Held* not to appear free from contributory negligence. *Biederman* v. *Dry Dock, East Broadway, etc., R. R. Co.*, 54 App. Div. 291.

Falling bricks.— In an action brought by a tenant of property adjacent to defendant's, to recover for bodily injuries received from the fall of bricks from defendant's chimney, on a part of the premises, rented by him to another, into the tenant's yard,—*Held*, that a nonsuit was error, though there was evidence that plaintiff had previous knowledge that the chimney was defective. *Kaiser* v. *Washburn*, 55 App. Div. 159.

Horse and wagon.— Defendant forcibly ran the plaintiff's horse and wagon from the railroad track, breaking his wagon and seriously injuring his horse. *Held*, that the act was clearly unlawful, and gave the plaintiff a right of action for his damages. *Fettrich* v. *Dickenson*, 22 How. Pr. 248.

Imputed negligence.— The degree of care required of one riding with a driver over whom he has no express control, *considered*. *Morris* v. *Metropolitan Street Ry. Co.*, 63 App. Div. 78.

Injury to property and injury to person, recovery upon one not a bar to recovery on the other.— Recovery for an injury to property not a bar to another action for injury to the person caused by the same act of negligence. An injury to the person and an injury to property, although resulting from the same tortious act, constitute different causes of action, and a judgment for damages to property recovered in one court, and the satisfaction thereof, is not a bar to the maintenance of an action for an injury to the person, in another court, arising from the same act. *Reilly* v. *Sicilian Asphalt Paving Co.*, 170 N. Y. 40, revg. s. c., 31 App. Div. 302.

Jurisdiction.— Where an action for wrongful injury to personal property is commenced by the service of a summons, accompanied by an order of arrest, jurisdiction does not depend upon the sufficiency of the affidavit upon which the order of arrest was made, but upon the service of the summons, and it still remains though the order was set aside as improperly granted. *McNeary* v. *Chase*, 30 Hun, 491.

Landlord and tenant; agreement.— An action for damages for personal injuries by a tenant against his landlord cannot arise out of a breach of the landlord's agreement to make repairs. *Folsom* v. *Parker*, 31 Misc. Rep. 348, 64 N. Y. Supp. 263.

Id.; ceiling; falling of, in tenant's apartment; notice of defect; promise to repair.— Landlords are not, in the absence of an agreement to repair, liable to a tenant for the defective condition of premises let to the tenant for his exclusive use, unless the defect is such that it amounts to a nuisance at the time when the lease was made. A child of a monthly tenant, living with his father, cannot maintain an action for negligence against the landlords of premises for injuries received from the fall of a portion of the ceiling in the apartments of

the father, and this, although the defect was brought to the attention of the landlords, and they, through their janitress of the building, promised to repair it, as the damages are too remote. *Miller* v. *Rinaldo*, 21 Misc. Rep. 470, revg. s. c., 20 Misc. Rep. 714.

A landlord who has not covenanted to make repairs is not liable to a tenant, as for a breach of contract for injuries which she received from the fall of the ceiling of a sleeping apartment, which was under her exclusive control: and where the tenant remains in occupation, to her personal injury, after knowledge of the defect, after complaint made to the agent of the premises (who reassures her as to the danger, and promises to have the ceiling fixed, and after her subsequent refusal to pay him rent because of the danger, her contributory negligence bars her right to recover of the landlord damages for her injuries, under allegations that he has been negligent. *Schwartz* v. *Apple*, 21 Misc. Rep. 513.

In an action against a landlord, brought by the wife of a tenant, for injuries received from the fall of a ceiling, where it was not shown that defendant had agreed to make repairs, or knew or had reason to know the ceiling was unsafe,—*Held*, that a recovery could not be had. *Kennedy* v. *Fay*, 31 Misc. Rep. 776, 65 N. Y. Supp. 202.

Id.; water.— Damage sustained from the leaking of water pipes must be borne by the tenant, where the landlord does not covenant to repair, and the lease exempts him from such damage. *Sonn* v. *Weissman*, 29 Misc. Rep. 622, 61 N. Y. Supp. 78.

Medical expenses.— In an action for bodily injuries, plaintiff may prove his medical expenses under an allegation that he "was put, and will still be put, to much expense in the treatment of his said injuries." *McCready* v. *Staten Island R. R. Co.*, 51 App. Div. 338, 64 N. Y. Supp. 996.

Negligence; railroad; assault and battery.— While this court has no jurisdiction in an action for assault and battery, it has jurisdiction in an action to recover damages for personal injuries growing out of defendant's (railroad company) neglect to fulfill the duty of protection which it owes to its passengers. *Hart* v. *Met. R. R. Co.*, 65 App. Div. 493.

The rule that it is negligence for a person to attempt to cross a public thoroughfare ahead of vehicles of any kind, upon a miscalculation of injury if such attempt be made, *considered*. *Johnson* v. *Rochester Ry. Co.*, 61 App. Div. 12.

Dumb-waiter.—The use, by a vendor of ice, of a dumb-waiter in an apartment-house, that he knew to be in a dangerous condition,—*Held* to be contributory negligence. *McGuire* v. *Board*, 58 App. Div. 388.

Elevator.— The lessee of a building, who subleases to various tenants and maintains a freight elevator for their common use, is to exercise reasonable care to see that the elevator is safe for the use to which

it is to be applied, and owes his duty to an expressman engaged in the business of a tenant. *Grifhahn* v. *Kreizer*, 62 App. Div. 413.

Excavation unguarded.— Verdict for plaintiff in an action for damages against a street railroad company and its contractor, for injuries received by falling into a hole in the street, four or five feet outside the railroad track, *set aside* for failure of proof that the condition of the street arose from any act of either of the defendants, though they had previously been engaged in work along the line of the road. *Moss* v. *Crimmins*, 57 App. Div. 587.

Exploding siphon.— Explosion of seltzer water sold by defendants to plaintiff, who was injured in consequence of the explosion,—*Held* to afford no cause of action against defendants therefor. *Glaser* v. *Seitz*, 35 Misc. Rep. 341.

A physician who undertakes the treatment of a patient is bound to exercise not only the skill required, but also care and attention in attending his patient until he notifies the patient that his professional relations are terminated, or he is himself discharged, and he is liable in damages to a patient whom he leaves after setting his fractured arm, and does not attend upon again, or provide attendance for, until after the fracture has improperly healed. *Gerken* v. *Plimpton*, 62 App. Div. 35.

Protection of person on premises of another.— The presence of a mischievous human being on the premises may constitute the danger against which the law requires of the occupant reasonable care to protect his invitee. A customer in a store is there by invitation of the merchant, who owes him the duty of reasonable care to secure him against injury, as well from the misconduct of the merchant's employees as from the dangerous condition of his premises, and for breach of the duty with consequent injury the customer may maintain an action for negligence against the merchant. *Swinarton* v. *Le Boutillier*, 7 Misc. Rep. 639.

Roof.— A landlord, required under the lease to repair the roof of the demised premises,—*Held* liable to the tenant for damage caused by water admitted through leaks after insufficient repairs. *Coleman* v. *Central Trust Co.*, 25 Misc. Rep. 295, 54 N. Y. Supp. 561.

A landlord who undertakes to put a new roof upon an apartment-house, and while the work is in progress suffers the roof to be in such a condition that the property of tenants is injured by a rainstorm, is liable in damages, though he employed an independent contractor to do the work. *O'Rourke* v. *Feist*, 42 App. Div. 136, 59 N. Y. Supp. 157.

Servants; negligence of.— Damages may be recovered for personal injuries, such as those caused by negligence of one of defendant's servants. *Coulter* v. *The American Merchants' Union Ex. Co.*, 56 N. Y. 585, revg. s. c., 5 Lans. 67.

Stopping runaway horse.— It is common knowledge that in a thickly-populated city there is always danger to life and property from a run-

away animal, and those who endeavor to stop it, even in the absence of any immediate pending danger, may not be charged with contributory negligence unless their act can be characterized as rash and reckless. If such act would have been performed by a person exercising reasonable care and prudence, measured by the circumstances, it is not negligence as matter of law and a case is presented for the jury. *Manthey as Admr.* v. *Rauenbeuhler*, 71 App. Div. 173.

A visitor to an apartment-house is not justified, unless under some special stress of circumstances, in proceeding through a hallway with which he is unfamiliar, when it is so dark that he is unable to see where he is going or with what obstruction he may meet. *Brugher* v. *Buchtenkirch*, 167 N. Y. 153, 60 N. E. 420, revg. 39 App. Div. 502.

15. To issue or vacate a requisition to replevy, a warrant of attachment, or an order of arrest; or grant or vacate a stay of execution, or of proceedings, within the limitations provided in this act. But such stay shall not exceed five days.

Notes to section 1, subdivision 15.

This subdivision is new under the head of jurisdiction, the powers therein mentioned were formerly given by section 1369 of the Charter of 1897, as amended in 1901.

In connection with this subdivision, see also the powers granted by subdivision 19.

Notes upon the subjects mentioned in this subdivision will be found under their respective heads in this work.

16. To render judgment in an action or make a final order in summary proceedings upon confession or upon the consent of both parties.

Notes to section 1, subdivision 16.

This subdivision is substantially the same as subdivision 13 of section 1364 of the Charter of 1897, as amended in 1901. The reference to title 6, chapter 19 of the Code of Civil Procedure has been omitted. The District Courts had jurisdiction to enter judgment by confession by Laws 1857, chap. 344, § 3, until the repealing acts of 1877, chap. 417, subd. 4, and 1880, chap. 245, subd. 33, which rendered such jurisdiction doubtful until the enactment of subdivision 13 of section 1364 of the Charter.

In a note to title VII, "Judgments and Executions," article 1, "Judgments," sections 248 to 251, above section 248, the commissioners on revision say that "sections 3010, 3011, and 3012 of the Code provide for judgments by confession, or by offer in justices' courts."

As to the practice on "Confession of Judgments," see those sections.

Appearance and consent.— Appearance, after service of defendant with summons and consent to enter judgment, is not entering judgment by confession. *Gates* v. *Ward*, 17 Barb. 424.

When invalid.— A confession of judgment to one who is simply a surety for the judgment debtor upon certain notes that have been given by him, where the confession states no facts, and does not show for what cause of action the judgment is to be entered, is invalid.

The principal is not indebted to his surety until the surety has paid the debt of the principal; and it cannot be said that a principal is indebted to his surety for notes signed by the latter, although the surety, in consideration of the confession of judgment for the amount thereof, has agreed to pay such notes. The language required by subdivision 3 of section 3011 of the Code of Civil Procedure, requiring an affidavit in case of such confession, "stating that the defendant is honestly and justly indebted to the plaintiff in the sum specified therein," etc., does not comprehend such an arrangement. The absence of any special provision for the entry of judgments on confession in justices' courts for contingent liabilities, and the requirements of the affidavit, specified in section 3011 of the Code of Civil Procedure, show that no such confessions for contingent liabilities were contemplated by the statute. *Adams* v. *Tator*, 57 Hun, 302.

Where parties between whom no action is pending appear of their own motion before a justice and execute papers which purport to be a confession of judgment but which do not comply with the formalities prescribed in section 3011 of the Code of Civil Procedure, no jurisdiction to enter judgment is thereby conferred. *Rowe* v. *Pickham*, 36 App. Div. 173.

17. Other civil actions or proceedings of which district courts in the city of New York, or justices of the peace had jurisdiction on the thirty-first day of December, eighteen hundred and ninety-seven, except such as shall be expressly excluded by this act.

Notes to section 1, subdivision 17.

This subdivision is substantially the same as the former section 14 of the Charter of 1897, as amended in 1901.

By section 364 all laws specified in the schedule annexed to this act, in force on the 1st day of September, 1902, are repealed. This includes all of the Charter acts of 1897, as amended in 1901, from sections 1364 to 1429, except sections 1373, 1378, 1383, 1424 to 1427, inclusive, which were not repealed or disposed of, but were preserved as Charter enactments. They have no reference to "actions or proceedings" men-

tioned in this subdivision, and so, with the sections of the Consolidation Act and Code of Civil Procedure, none of them left unrepealed have reference to actions or proceedings.

Section 20 of this act made the provisions of the Code of Civil Procedure applicable in certain cases, but that has reference to procedure, and under title I, "Jurisdiction and General Powers," it has reference to the general powers of this court, and not to jurisdiction of "actions or proceedings."

Section 362 of this act, "Construction," declares the provisions of this act are not new enactments, but a *continuation* of the former laws.

As by section 2 of this act, entitled "No jurisdiction in certain cases," only two classes of cases are excluded, to wit, "where title to real property comes in question," and "equity jurisdiction," it seems that this court has jurisdiction of every other action, limited however by the express specifications of section 1, subdivision 1 to and including 19.

Action against joint debtors.— After recovery of judgment against those served an action may be maintained against those not served to procure a judgment charging their property with the sum remaining unpaid upon the original judgment. See § 268.

Parties who may be joined.— See § 142.

Application of this article to defendants jointly liable (there is no "article," it is title II, Actions; Summons; Parties). See § 43.

18. The jurisdiction extends to actions against the city of New York, a domestic corporation, or a foreign corporation having an office in the city of New York, an administrator or executor as such, where the amount claimed does not exceed five hundred dollars.

Notes to section 1, subdivision 18.

This subdivision is taken from the preamble of section 1364 of the Charter of 1897, as amended in 1901, and adding thereto by giving jurisdiction *against* an administrator or executor as such where the amount claimed does not exceed $500.

It must be observed that this subdivision does not read, "The jurisdiction extends to actions *by* or against * * * an administrator or executor as such, but only *against* an administrator or executor." By section 1365, subdivision 2 of the Charter of 1897, as amended in 1901, it is provided that this court cannot take cognizance of any civil action where the action is brought against an executor or administrator as such, *and the amount claimed* IS IN EXCESS of fifty dollars, so that this court had jurisdiction where the amount claimed was *less* than fifty dollars.

We suppose that as jurisdiction of an action *by* an administrator or executor as such is not expressly excluded, that they can come into this court and sue in a representative capacity the same as any other person. This subdivision does away with the numerous vexatious questions as to jurisdiction in actions against foreign corporations, and allows actions to be brought in this court against the city of New York which formerly could only be brought in the Supreme Court. See §§ 155 and 156.

19. In an action or a summary proceeding, to direct or set aside a verdict, vacate, amend or modify a judgment or final order rendered, or made on consent, confession, inquest or trial, grant a new trial, open a default, or in a proper case grant a new trial on the ground of fraud or newly discovered evidence.

Notes to section 1, subdivision 19.

This section is new, comprising in a condensed form the powers heretofore exercised by this court or any justice thereof under the Consolidation Act (Laws 1882, chap. 410), section 1367, except the power to grant a new trial for newly-discovered evidence.

In connection with the powers given by this subdivision, see also the powers granted by subdivision 15 of this section.

Notes upon the subjects specified in this subdivision will be found under such subjects in this work.

In subdivision 12 of this section, in relation to Summary Proceedings, the court is given power to "grant or *deny* a motion for a new trial." In the present subdivision 19 the power of the court, as therein expressed, is limited to "grant a new trial," the words "*or deny*" are omitted.

The jurisdiction or power is however perfected by section 255, where it is provided, "The court may also in a proper case grant *or deny* a motion for a new trial on the ground of fraud, or newly-discovered evidence."

Court may direct verdict, when.— See § 252.

Motion to set aside verdict, or vacate or amend judgment.— See § 254. This was also authorized by Laws 1896, chap. 748. See also *Douglass* v. *Seiferd*, 18 Misc. Rep. 188; *Krakower* v. *Davis*, 20 Misc. Rep. 350; *Colwell* v. *Devlin*, 20 Misc. Rep. 355.

New trial; fraud or newly-discovered evidence.— See § 255.

§ 2. **No jurisdiction in certain cases.**— The said municipal court cannot take cognizance of any civil actions in either of the following cases:

Notes to section 2.

The preamble to this section is the same as the preamble in section 1365 of the Charter of 1897, as amended in 1901. It had four subdivisions which are now reduced to two. It will be observed that this court, as here declared, had no jurisdiction in only two class of cases, that is where the title to real property or equity comes in question, except that an equitable defense is allowed in summary proceedings.

This section has reference entirely to no jurisdiction in civil *actions*, and does not mention "general powers."

There are many subjects and matters of which the court has *not* jurisdiction. The following are the most important:

Abatement.— After reversal, and remittal to this court for a new trial, and inquest taken, but not signed by the judge, nor judgment entered, the action abates, and jurisdiction is lost. *Trenton, etc.* v. *Smith*, 26 Misc. Rep. 822, 56 N. Y. Supp. 1075.

Adjournment.— On appeal the loss of jurisdiction because of illegal adjournments must appear from the statement in the record of the dates of the adjournments, and of the party at whose instance they were allowed, in order to be available as a ground of appeal from the judgment rendered. *Chevra Bnei Israel Anshe, etc.* v. *Chevra Bikur Cholin Anshe, etc.*, 23 Misc. Rep. 367, 51 N. Y. Supp. 236.

Id.; default; judgment.— This court has no power to render judgment after adjournment in the *interim* as upon defendant's default in answering. *Whitman, etc.* v. *Hamilton*, 27 Misc. Rep. 198, 57 N. Y. Supp. 760.

Assault and battery; negligence.— This court has no jurisdiction of an action for assault and battery by the conductor of the defendant railroad company, negligence on the part of defendant or breach of contract not being alleged. *Fisher* v. *Metropolitan Street Ry. Co.*, 30 Misc. Rep. 430, 62 N. Y. Supp. 467.

Attachment.— The mere mailing of the summons and attachment by the marshal, without posting copies of the same on the door of defendant's residence, does not give a justice of this court jurisdiction. and where such service is made, the return must state the reason for not making personal service. *Shapiro* v. *Goldberg*, 31 Misc. Rep. 755, 64 N. Y. Supp. 88.

Attorney's lien.— This court is an inferior court of limited statutory jurisdiction, has no such equitable control over its judgment as empowers it to enforce an attorney's lien thereon by vacating, to the extent of the lien, a satisfaction executed by the client, and issuing execution for the lien. *People ex rel. Moses Jaffe* v. *Fitzpatrick*, 35 Misc. Rep. 456.

Consequential damages.— An action against policemen for preventing the removal of property under an execution, by taking the marshal to whom it was intrusted before a police magistrate, whereby the property

was not taken and the proceeds thereof were lost to the judgment creditor,— *Held* to have been improperly entertained since the justice might be assumed to have found that the cause of action was not for an injury to property within section 1364 of the Charter, but at most for consequential damages and not within the jurisdiction of the court. *Kneustler* v. *Doyle*, 30 Misc. Rep. 442, 62 N. Y. Supp. 593.

Decedent's debts.— As to whether this court has jurisdiction of an action to charge the next of kin of a decedent with his debts, brought under the Code of Civil Procedure, section 1837, *quære? Siegel* v. *Cohen*, 23 Misc. Rep. 365; s. c., 51 N. Y. Supp. 318.

Disputed jurisdiction.— The fact that no instance is adduced of the exercise of disputed jurisdiction affords a strong argument against the existence of the jurisdiction. *Roche* v. *McCaldin*, 48 N. Y. St. Rep. 695.

Dismissal.— If plaintiff fails to appear on the adjourned day, and the cause is dismissed therefor, the justice loses jurisdiction of defendant, and plaintiff cannot thereafter restore the case and take an inquest. *Abrams* v. *Fine*, 28 Misc. Rep. 533, 59 N. Y. Supp. 550.

Decision of justice not in time.— Judgment rendered after the time limited by law or by consent of the parties for the decision, is void for want of jurisdiction. *Lambert* v. *Solomon*, 28 App. Div. 562, 59 N. Y. Supp. 676.

This court loses jurisdiction of a cause if the issues are not decided within the eight (now fourteen) days specified by statute, or within the time for which a stipulation extending the statutory limit of eight days provides, and no decision being rendered and no certificate for a jury trial being made within the time, a trial had thereafter against objection is nugatory. *Lamura* v. *Haggerty*, 30 Misc. Rep. 745, 62 N. Y. Supp. 1084.

By section 230 the justice has fourteen days to decide a cause.

Enlargement of jurisdiction by construction was refused in *Mayor, etc.* v. *Decker*, 12 Daly, 65.

Estoppel.— Defendants answering upon the merits, and giving the bond required by section 1366 of the Charter are estopped from asserting that the court has not jurisdiction of their persons. *Vogel* v. *Banks*, 60 App. Div. 459, 70 N. Y. Supp. 1010.

Implication.— It is a clear and salutary principle, that inferior jurisdictions, not proceeding according to the course of common law, are confined strictly to the authority given them. They can take nothing by implication, but must show the power expressly given them, in every instance. The sound rule of construction is to be liberal in reviewing their proceedings as far as respects regularity and form, and strict in holding them to the exact limits of jurisdiction, prescribed to them by statute. *Jones* v. *Reed*, 1 Johns. Cas. 20; s. c., 1 Paine, 594; *Loomis* v. *Bowers*, 22 How. 361; *Ahern* v. *Nat. Steamship Co.*, 11 Abb. N. S. 362.

Fictitious name.— Jurisdiction of the person is not acquired by service upon him of a summons naming a person of a different Christian name as defendant, without more. Ignorance of the name should be made to appear in the summons to justify the use of a fictitious name. *Fisher* v. *Hetherington*, 11 Misc. Rep. 575.

Judgment of a court of record.— This court has no jurisdiction of an action on a judgment of a court of record. *Lambert* v. *Hoffman*, 24 Misc. Rep. 752, 53 N. Y. Supp. 962.

Loss of jurisdiction.— Where the record on appeal shows that judgment was not entered until after the expiration of eight (now fourteen) days after the trial and submission of the case to the justice for decision, the judgment must be reversed for loss of jurisdiction to render it. *Penniman* v. *La Grange*, 23 Misc. Rep. 121, 50 N. Y. Supp. 710.

Objection to jurisdiction when to be taken.— The fact that jurisdiction over the defendant does not appear is not available if not taken at the trial. *Hill* v. *Moebus*, 31 Misc. Rep. 134, 63 N. Y. Supp. 1022.

Objection to jurisdiction, when may be taken.— The objection to the jurisdiction is taken in time although first presented on the second trial, if the fact of want of jurisdiction then appeared for the first time. *Brooks* v. *Dinsmore*, 28 N. Y. St. Rep. 421, 18 Civ. Proc. Rep. 98, 8 N. Y. Supp. 103.

Order of reference.— An order of reference in this court, though entered by consent of the parties, is absolutely void. *Barker* v. *Lane*, 60 App. Div. 87, 69 N. Y. Supp. 739, revg. 33 Misc. Rep. 60, 68 N. Y. Supp. 147.

Service of summons and complaint on defendant's attorney, not followed by appearance on the return day, gives no jurisdiction, and a judgment entered thereon as by default is void. *Goldberg* v. *Fowler*, 29 Misc. Rep. 328.

Referee.— This court has no power to appoint a referee, even on consent. *Barber* v. *Lane*, 60 App. Div. 87.

Service of summons not a fact.— The return of a marshal of personal service of the summons on the defendant establishes jurisdiction *prima facie*, but if the service was not a fact, no jurisdiction is acquired. *Iron Clad Mfg. Co.* v. *Benjamin E. Smith & Sons*, 28 Misc. Rep. 172, 59 N. Y. Supp. 332.

Subject-matter.— Where the statute has not conferred jurisdiction over the subject-matter of the action, any judgment which may be rendered will be absolutely void. *Coffin* v. *Tracy*, 3 Cai. 129; *Blin* v. *Campbell*, 14 Johns. 432; *Dudley* v. *Mayhew*, 3 N. Y. 9; *Beach* v. *Nixon*, 9 N. Y. 36; *Kintz* v. *McNeal*, 1 Den. 436.

Substituted service by leaving the copy of the summons at what was assumed to be the defendant's residence, but which in fact was not, the defendant having left the State, is insufficient to confer juris-

diction. *Matter of Norton*, 32 Misc. Rep. 224, 66 N. Y. Supp. (100 St. Rep.) 317.

Summons; amendment of.— Justice has no power to allow an amendment of summons on trial by adding the amount named in the summons to another action between the same parties. *Balch* v. *Wurzburger*, 9 Misc. Rep. 74.

Id.; not indorsed, the court gets no jurisdiction. *Bissell* v. *N. Y., etc., R. Co.*, 67 Barb. 385. But see *Spooner* v. *Cornell*, 12 Civ. Proc. Rep. 319.

Tender of undertaking for removal of the action into the City Court ceases the jurisdiction of this court. *Leverson* v. *Zimmerman*, 31 Misc. Rep. 642, 64 N. Y. Supp. 723.

Waiver of amount in excess of jurisdiction.— A recovery in excess of jurisdiction may be waived and a recovery had up to the amount of the jurisdiction of this court. *Globe* v. *Rauch*, 21 Misc. Rep. 48.

Written contract of conditional sale; hiring of personal property, or chattel mortgage, et cetera.— By section 139, no action can be maintained in this court, which arises on a written contract of conditional sale of personal property, where title is not to vest in the person hiring until payment of a certain sum; or a chattel mortgage made to secure the purchase price of chattels, except an action to foreclose the lien, as provided in this section.

1. Where the title to real property comes in question as prescribed in title four of this act. But in an action brought in said court, the surety upon the defendants undertaking is liable in the case specified in section one hundred and eighty of this act, to any amount for which judgment might have been rendered by said court if the answer and undertaking had not been delivered.

Note to section 2, subdivision 1.

This subdivision is the same as subdivision 1 of section 1365 of the Charter of 1897, as amended in 1901, with the exception of the references to title 3 of chapter 19 and sections 2951 to 2958 of the Code of Civil Procedure, and section 1349 of chapter 410 of Laws 1882 (the Consolidation Act), therein contained, having been eliminated. Sections 2951 to 2958 of the said Code were the same as sections 1349 to 1356 of the Consolidation Act, and are now contained in title 4 of this act, sections 179 to 186.

2. Said court shall not have any equity jurisdiction, except however that this subdivision shall not be so construed

as to prevent a person to or against whom a precept is issued as provided in title two of chapter seventeen of the code of civil procedure, from setting up an equitable defence in summary proceedings.

Notes to section 2, subdivision 2.

Attorney's lien; vacating satisfaction of judgment.—This court has no power to vacate a satisfaction-piece filed and issue execution on the judgment to enforce an attorney's lien. *People ex rel. Jaffe* v. *Fitzpatrick*, 35 Misc. Rep. 456, 71 N. Y. Supp. 191.

Equity powers.— Upon a written contract for the payment of a specified sum monthly, the plaintiff sued for the amount due one month; the defendant answered with a general denial, but admitted the execution of the contract; the litigation involved the terms thereof, and a less sum was recovered; this recovery was sustained against the objection that the court had exercised equity powers in reforming the contract, the evidence supporting the judgment rendered. *Railway, etc., Co.* v. *Standard, etc., Co.*, 29 Misc. Rep. 115, 60 N. Y. Supp. 265.

No equity powers.—District Courts possessed none of the peculiar powers of courts of equity and had no jurisdiction whatever in respect to them. *Williams* v. *Carroll*, 2 Hilt. 438; *Salter* v. *Parkhurst*, 2 Daly, 240.

No affirmative relief on the ground of fraud can be had except to recover damages for fraud or deceit, as provided by section 1, subdivision 13, of this act. In the case of *Malkemesius* v. *Pauly*, 17 Misc. Rep. 371, the court tried the question of fraud in the making of an assignment for the benefit of creditors as a defense to an action upon a bond given by a claimant, no affirmative relief being asked on that ground.

Defense of fraud.— While this court has no equity jurisdiction, fraud in inducing a contract is there, as elsewhere, available as a defense. *Estelle* v. *Dinsbeer*, 9 Misc. Rep. 485; s. c., 61 N. Y. St. Rep. 96, 30 N. Y. Supp. 226; *Malkemesius* v. *Pauly*, 17 Misc. Rep. 371.

Written instrument.— These courts have no jurisdiction in actions brought to reform a written contract upon the ground of a mistake of a material fact; nor have they in an action upon a written instrument which completely expresses the agreement of the parties' power to receive evidence that the same was made under such a mistake. *Ferree* v. *Ellsworth*, 1 Delehanty, 93; s. c., 47 N. Y. St. Rep. 119, citing *Williams* v. *Carroll*, 2 Hilt. 438; *Salter* v. *Parkhurst*, 2 Daly, 240.

§ 3. **Removal.**— In an action specified in the last section but one, excepting subdivisions four and five, where the dam-

ages claimed or the value of the chattel or all the chattels claimed, as stated in the complaint, exceeds two hundred and fifty dollars, the defendant may, after issue is joined and before an adjournment has been granted upon his application, apply to the justice holding court in the district in which the action is brought for an order removing the action, and if it be in the second district of the borough of the Bronx, or in any district in the borough of Manhattan, to the city court of the city of New York, if in any other district into the county court of the county wherein the district is situated, if the said county court has jurisdiction of such action, otherwise into the supreme court in such county. Such an order must be granted upon the defendant's filing with the clerk an undertaking approved by the court, in a sum not less than twice the amount of the damages claimed or twice the value of the chattel or of all the chattels claimed, as stated in the complaint, with one or more sureties, to the effect that the defendant will pay to the plaintiff the amount of any judgment that may be recovered against him in the court to which such action shall be removed. From the time of granting the order, the city court or county court or supreme court, as the case may be, has cognizance of the action, and the clerk of the court must forthwith deliver to the clerk of such court to which the action shall be removed all process, pleadings and other papers in the action, and certified copies of all minutes, entries and orders relating thereto, which must be filed, entered or recorded, as the case requires, in the latter's office. Where there are two or more defendants to an action all of the defendants must unite in the application. But the court in the district in which the action is brought, if satisfied from all the circumstances of the case, by competent proof either by affidavit or the examination of witnesses that the defendants, other than the one making the application, have been named as defendants, solely for the purpose of preventing the removal, may, notwithstanding the failure of defendants to unite, grant the application for removal.

Notes to section 3.

This section was formerly section 1366 of the Charter (Laws 1897, chap. 378, as amended in 1901), which superseded section 1287 of the Consolidation Act (Laws 1882, chap. 410), the latter of which took the place of section 3216 of the Code of Civil Procedure. The order of removal was formerly to the Court of Common Pleas up to the time when by Laws 1895, chapter 946, that court was abolished, and since which time the removal has been and is now under the present act to the "City Court of the city of New York."

Two important changes have been made in this section. In the former section 1365 of the Charter of 1897, as amended in 1901, it was required that the defendant file with the clerk an undertaking in a sum *fixed by the justice*, etc. Thus the undertaking was often executed with the sum blank, and after its execution the justice fixed the amount, which was inserted in the undertaking; this gave rise to the decisions in *Schcrens* v. *Hopkins*, 42 N. Y. St. Rep. 189; s. c., 16 N. Y. Supp. 863, that a valid undertaking on removal may be executed before the amount is fixed by the court, and if it is in the amount so fixed it will be binding on the sureties from the time it is filed with the clerk, although the fact of the fixing is not recited in it; and to the case of *Morgan* v. *Lehigh R. R. Co.*, 14 Misc. Rep. 26, that the fact that the undertaking was executed before the court had made an order fixing its amount is no reason for denying an application for removal.

The other change is that relating to a case where there are two or more defendants who must unite in the application to prevent an improper interference with the right of removal. This legislation was caused doubtless by such cases as *Matter of Suydam*, 26 Misc. Rep. 868, and *People ex rel. Metropolitan St. Ry. Co.* v. *Roesch*, 27 Misc. Rep. 44, 57 N. Y. Supp. 295.

It will be observed that the actions mentioned in subdivisions 4 and 5 of section 1 are *excluded* from removal; these are actions upon a bastardy or abandonment bond, and an action upon the bond of a marshal.

Care must be taken that the application to remove is made *after* issue joined, and *before* an adjournment is had. The form of the undertaking and the order on removal provide for this. Care must also be taken that the undertaking is approved by the court.

Adjournment.— A motion by the party desiring the removal which necessitates an adjournment is equivalent to an application for an adjournment. *Ives* v. *Quinn*, 7 Misc. Rep. 660.

Where defendant withdraws his application for removal on return day of summons and obtains an adjournment, he loses his right to removal. *Enright* v. *Franklin Pub. Co.*, 24 Misc. Rep. 181; s. c., 52 N. Y. Supp. 704.

By the terms of the statute, after an adjournment had at defendant's instance, it is too late to remove. *Dinkle* v. *Wehle*, 11 Abb. N. C. 124.

For further examples and cases, see "Waiver of Right," below.

Amendment of undertaking can only be had with the consent of the sureties. *Langley* v. *Warren*, 1 N. Y. 606; s. c., 3 How. 363; *Wilson* v. *Allen*, 3 How. 369. Consult however *Wood* v. *Kelly*, 2 Hilt. 334; *Irwin* v. *Muir*, 13 How. Pr. 409; s. c., 4 Abb. 133; *Robins* v. *Moran*, 23 Week. Dig. 326.

Amount; interest on claim.— Interest is an element of a debt or claim, and follows as a matter of right. And where the complaint in an action brought upon a check for $100, demands the amount of the check and five days' interest, "the damages claimed" exceed within the meaning of section 3216 of the Code of Civil Procedure $100, and the appellant defendant is consequently entitled as a matter of right to remove the case to the City Court upon complying with the requirements of the said section. *Blumenthal* v. *Lloyd*, 18 Misc. Rep. 195.

Where the complaint, in an action for personal injuries, demands judgment for $245, with interest from a day stated, the case may properly be removed to the City Court of said city if the interest, if given by the jury upon the trial, would make the damages exceed $250 at the time when removal is sought. *Lewis* v. *Metropolitan St. Ry. Co.*, 35 Misc. Rep. 304.

Consolidation of actions; removal on.— The Marine Court (City Court of New York), on a motion to consolidate, had power to remove to itself an action pending in one of the District Courts of the city of New York. *McKay* v. *Reed*, City Court Rep., vol. 1, p. 464. See also s. c., 12 Abb. N. C. 58 and 22 Abb. N. C. 62, followed in *Sire* v. *Knuper*, 19 N. Y. St. Rep. 43; s. c., 22 Abb. N. C. 63, and 2 McCarthy, 194, n.

The City Court of New York has power to remove from this court and consolidate with an action pending in it between the same parties, an action in this court where the causes of action arise out of the same transaction and are provable by the same evidence. *Curley* v. *Schafer Brewing Co.*, 35 Misc. Rep. 131.

Constitutionality.— The statute to remove the cause is not unconstitutional, as impairing the obligation of a contract or taking a vested right. *Johnson* v. *Ackerson*, 3 Daly, 430.

Costs on removal.— In *Lercne* v. *Hahner*, 62 App. Div. 195, it was held, "that with respect to actions originally commenced in this court and removed into the City Court of the city of New York and tried therein, no provision has been made by the Legislature as to costs, and that under such circumstances neither party is entitled to them.

By section 332, it is provided that, "Where an action is removed, as provided in section three of this act, costs shall be allowed the same as if the action had been commenced in the court to which it is removed."

Discontinuance of action cannot be granted until the justice has approved the undertaking on removal or refused to do so. *Tuttle* v. *Galligan*, 23 Misc. Rep. 457, 51 N. Y. Supp. 359; *Leverson* v. *Zimmerman*, 31 Misc. Rep. 642, 64 N. Y. Supp. 723.

Duty of justice in approving undertaking.— Where an undertaking with two sureties is presented to the justice for the purpose of the removal of a proper case into the Court of Common Pleas, the justice is bound judicially to approve the undertaking and sign the order of removal. The justice has no discretion in such a case to refuse to approve and accept of one of the sureties on the ground that he is personally acquainted with him and will not accept him as a responsible surety. *O'Connor* v. *Moschowitz*, 48 How. Pr. 451.

Remedy, if justice refuse to accept the undertaking.— Where the justice erroneously refused to accept the undertaking and sign the order of removal the defendant's remedy is by appeal, and prohibition will not lie against further proceedings in the case by the justice. *People* v. *Fourth District Court*, 13 Civ. Pro. Rep. 134. See also *O'Connor* v. *Moschowitz*, 48 How. Pr. 451; *Greve* v. *Wallowitz*, 24 Misc. Rep. 601.

On appeal a judgment was reversed on the ground that the justice had proceeded after his jurisdiction was arrested by an application for removal of the cause. *Held*, that, after the appellate court had intimated or announced its decision, it was too late for a motion to amend the justice's return so as to show that, before defendants' application for removal, there had been an adjournment on their application, and for a reargument on such amended return. *Warren* v. *Campbell*, 14 N. Y. Supp. 165. This case contains on page 166 *a note on removal.* The case is also reported in 37 N. Y. St. Rep. 762.

A refusal to grant an application for removal of the cause cannot be held to be prejudicial error where the record fails to show that such application has been made after issue was joined. *Zeimer* v. *Stearns*, 14 Misc. Rep. 7.

Effect of offer of undertaking; jurisdiction arrested.— The jurisdiction of the justice is arrested when the undertaking is offered, and he can take no step in the cause, except to adjourn, until he has accepted or refused the undertaking. *Hogan* v. *Devlin*, 2 Daly, 184; *Warren* v. *Campbell*, 14 N. Y. Supp. 165.

The tender of the undertaking for removal of the cause to the City Court, under Code Civ. Proc., § 3216, arrests the jurisdiction of the justice until he has approved the undertaking or refused to do so, and he has no authority thereupon to grant a discontinuance. *Tuttle* v. *Galligan*, 23 Misc. Rep. 457, 51 N. Y. Supp. 359. See also *Leverson* v. *Zimmerman*, 31 Misc. Rep. 642, 64 N. Y. Supp. 723.

Estoppel; jurisdiction; waiver.— Defendants answering upon the merits and giving the bond required are estopped from asserting that

the court has not jurisdiction of their persons. *Vogel* v. *Banks*, 60 App. Div. 459, 70 N. Y. Supp. 1010.

Exception to and justification of sureties.— Neither the act of 1857 (chap. 344), the Charter Act of 1897, as amended in 1901, section 1365, made, nor does the present act make, any provisions for an exception to, and justification of, sureties. This gave rise to such decisions as *Moore* v. *Thompson*, 2 Daly, 180, where it was held, the justice could adopt any reasonable mode of satisfying himself of the sufficiency of the sureties. See also *Fleurelling* v. *Brandon*, 4 Daly, 333.

This omission from section 3 of the present act has been provided for in section 70 of the present act, headed "Sections applicable as to undertakings," etc., making sections 106 to 110 and sections 127 and 128 of the present act relating to the exception, qualification and justification of sureties and the approval or allowance of the undertaking apply to the undertaking on removal.

Increasing amount sued for.— An amendment on the trial, by including the amount claimed in another action in the same court, though it increased the amount to a sum which entitled defendant to a removal, deprived him of his opportunity to claim such a right, and was therefore improperly granted. *Baleh* v. *Wurzburner*, 29 N. Y. Supp. 62; *Walker* v. *Scott*, 3 Misc. Rep. 329; s. c., 23 N. Y. Supp. 234, 23 Civ. Proc. Rep. 90.

Insufficient undertaking.— An action brought in the borough of Brooklyn may, under the Charter of 1897, be removed to the County Court as a matter of right by defendant, where it is brought to recover chattels of a value exceeding $250, upon filing the statutory undertaking with one surety, and if the justice deems the undertaking offered to be insufficient, he may permit another undertaking to be furnished. *Greve* v. *Wallowitz*, 24 Misc. Rep. 601.

Mandamus will not issue to compel a justice to order the removal of a cause to the City Court, which he refuses to do on the ground he has no power, where there is an adequate remedy by appeal. *People ex rel. Metropolitan St. Ry. Co.* v. *Roeseh*, 27 Misc. Rep. 44, 57 N. Y. Supp. 295.

Mistakes, omissions, defects, and irregularities; and general rules respecting affidavits, bonds and undertakings.— See notes to § 1, subd. 3, and § 3.

Offer to allow judgment.— As to the effect of an offer in the court below after a removal, see *Mack* v. *Soule*, 52 Hun, 198, 23 N. Y. St. Rep. 307, 17 Civ. Proc. Rep. 121.

Reducing amount of claim.— Where a justice, after the filing of such an undertaking, and before its approval or disapproval by him, entertained a motion by the plaintiff to reduce the amount of his claim, and thus, on the proof adduced, gave a judgment for the plaintiff,—*Held*, that such judgment was erroneous, and will be reversed on appeal. *Hogan* v. *Devlin*, 2 Daly, 184.

Remanding for amendment.— Where after the removal of a cause it appears that the undertaking given to secure such removal is defective in that it does not state any amount of penalty, the court should direct that the return be remanded for the purpose of allowing an amendment to the undertaking. *Levy* v. *Scheringer*, 19 Civ. Pro. Rep. 346.

Status of action removed.— See *Druckermiller* v. *Shoniger*, 15 Daly, 477; *Latterman* v. *Fere*, 11 Civ. Proc. Rep. 217; *Salter* v. *Parkhurst*, 3 Daly, 240.

Stay of proceedings in this court by the Supreme Court.— Upon hearing of a motion to consolidate with an action in the Supreme Court an action pending in a District Court, it was shown that on the 16th day of October, 1895, the plaintiff commenced an action in a District Court upon a policy of insurance against two persons named Daynes and Van Der Hoogt, who were alleged to be severally liable; that on the 9th day of November, 1895, he began the present action upon the same policy against the same defendants and forty-eight other defendants, and claimed herein a several liability on the part of each defendant for the whole amount of the insurance for which the policy was written. The court denied the motion to consolidate. *Held*, that this was proper. *That* the proper course for the defendants was not to have moved to consolidate, but to have moved to stay the trial of the District Court action until the trial of the action in the Supreme Court and that the court had power to direct such a stay. *Iscar* v. *Daynes*, 1 App. Div. 557.

Supplemental answer cannot be allowed in an action removed from this court under the statute, but an amended answer setting up such supplemental matter may be allowed on terms. *Meyers* v. *Rosenback*, 9 Misc. Rep. 89.

Tender of undertaking for removal.— Jurisdiction over an action removable to the New York City Court, in which there has been no adjournment, ceases upon the tender by defendant of an undertaking for the largest amount mentioned in Code of Civil Procedure, section 3216, though no order was made. *Leverson* v. *Zimmerman*, 31 Misc. Rep. 642, 64 N. Y. Supp. 723. See also *Tuttle* v. *Galligan*, 23 Misc. Rep. 457, 51 N. Y. Supp. 359.

Waiver of right.— By the terms of the statute after an adjournment had at defendant's instance, it is too late for an order of removal. *Dinkle* v. *Wehle*, 11 Abb. N. C. 124.

Where an action is, after issue joined, adjourned by consent, and the parties afterward proceed to trial, defendant thereby waives his right to remove the action. *Halperin* v. *Schermerhorn*, 28 N. Y. Supp. 562.

An action cannot be removed after the parties have elected to proceed to trial and submitted to the jurisdiction. *Halperin* v. *Schermerhorn*, 56 N. Y. St. Rep. 336.

Where, after filing the undertaking, an adjournment is granted to allow defendant to produce his sureties, and on the adjourned day he fails to appear and judgment goes against him by default, on opening the default he waives his right to recover by signing a stipulation to pay the amount of plaintiff's claim into court, and to come in and defend on the merits. *Krahner* v. *Heilman*, 9 N. Y. Supp. 633.

An adjournment was taken in order to allow defendant to produce his sureties to justify on an undertaking offered for the removal of the cause, but he failed to appear on the adjourned day, and his default was taken. Subsequently, the default was vacated and defendant permitted to defend on depositing the amount of plaintiff's claim and costs with the court and signing a stipulation to that effect, and the case was thereafter adjourned several times. *Held*, that defendant by his stipulation and his subsequent proceedings waived his right to a removal. *Krahner* v. *Heilman*, 16 Daly, 132; s. c., 30 N. Y. St. Rep. 434, 9 N. Y. Supp. 633.

On a preliminary motion the court imposed costs upon the plaintiff as a condition of requiring defendant to answer. Defendant answered and filed undertaking on application for removal of the cause to the City Court, and upon appearing with his sureties for justification, suggested that plaintiff had not paid the costs imposed upon him, whereupon the court adjourned the case for a week, and on the adjourned day dismissed it on defendant's motion, but subsequently vacated the order of dismissal. *Held*, that these facts did not constitute a waiver of defendant's right to a removal of the cause. *Schnitzpahn* v. *The Davis Sewing Machine Co.*, 19 Misc. Rep. 621.

PROCEEDINGS AFTER REMOVAL IN THE CITY COURT.

Action not as one brought in a court of record.— An action removed is not an action "brought" in court of record, within the meaning of section 3268 of the Code of Civil Procedure, allowing defendant to require security for costs from a nonresident plaintiff. But while defendant cannot require security for costs, the court may require it, under section 889 of the Code, as a condition of allowing plaintiff a commission to take testimony abroad; and such a condition is reasonable where plaintiffs have delayed their application without apparent cause, and their recovery is doubtful. *Hames et al.* v. *Judd*, 16 Daly, 110.

Amendment of pleadings.— The court has power to allow amendment of pleadings in actions removed to it from the court below, to the same extent, and within the same limits, as the court below would have had if no such removal had taken place. *Lalleman* v. *Fere*, 18 Abb. N. C. 56; s. c., 11 Civ. Proc. Rep. 217: *Ludwig* v. *Martin*, 4 Daly, 481.

Amount of recovery limited as in court below.— After removal, the plaintiff is limited in the amount of his recovery by the special juris-

diction of the court below; a complaint demanding a greater sum is bad on demurrer. *Druckenmiller* v. *Shoninger*, 15 Daly, 477; s. c., 29 N. Y. St. Rep. 142, 8 N. Y. Supp. 482; *Ives* v. *Quinn*, 7 Misc. Rep. 660; s. c., 58 N. Y. St. Rep. 390, 28 N. Y. Supp. 267.

More than $250 may be recovered, if claimed in the summons, as was decided in the well-considered case of *Ludwig* v. *Minnott*, 4 Daly, 481; but this case was not mentioned or followed on this point in subsequent decisions, although it is mentioned with approval in *Lalleman* v. *Fere*, 18 Abb. N. C. 60, upon the question of amendment of the pleadings after removal.

Defective undertaking; remedy for.— Where, after the removal of a cause, it appears that the undertaking given to secure such removal is defective in that it does not state any amount of penalty, the court should direct that the return be remanded for the purpose of allowing an amendment to the undertaking. *Levy* v. *Scheringer*, 19 Civ. Proc. Rep. 346; s. c., 13 N. Y. Supp. 560.

Where one of two defendants, who was served with the summons, in his undertaking on removal omitted to allege that his codefendant had not been served; upon motion to remand the action for said error, the court granted the motion for the purpose of allowing the undertaking to be amended in the court below, and otherwise denied the motion. *Nicoll* v. *Palmer*, 68 N. Y. St. Rep. 791, citing *Levy* v. *Scheringer*, 18 Civ. Proc. Rep. 346.

Improper removal.—Where a case is improperly removed, it may be remanded. *Field* v. *Talcott*, 4 Law Bul. 22.

Increase of amount claimed after the removal, to the court into which the action was removed, is discretionary with the court, and will not be granted if there is *laches* in the application, and without reason given for the increase. *Katzenbach* v. *McLeod*, Lawrence, J., N. Y. Law Journal, Feb. 8 and May 1, 1896. See also *Walker* v. *Scott*, 3 Misc. Rep. 329, and opinion in *Smith* v. *White*, 23 N. Y. 574; *Ludwig* v. *Minnott*, 4 Daly, 481; *Oakes* v. *High*, 11 Misc. Rep. 213.

An action brought on oral pleadings was removed and the pleadings reduced to writing under an order of the court. Defendant thereupon, in his written answer, interposed a counterclaim for a greater sum than claimed in the court below, and in excess of the amount for which the District Courts could entertain jurisdiction. *Held*, that the service of the answer, setting up new defenses and a counterclaim for a larger sum without leave of the court, was unauthorized. *Walker* v. *Scott*, 3 Misc. Rep. 329; s. c., 23 N. Y. Supp. 234, 23 Civ. Proc. Rep. 90; *Balch* v. *Wurzburner*, 29 N. Y. Supp. 62.

Jurisdiction and practice.— When a cause is transferred it becomes subject to all the general rules of practice and principles of law governing cases of like character as to which the court has original jurisdiction. *Ludwig* v. *Minnott*, 4 Daly, 481.

The court to which the action was removed has exclusive jurisdiction of the action and all proceedings thereunder, and if the plaintiff prosecuted in the court below was a poor person, a new order must be obtained. *Oakes* v. *High*, 11 Misc. Rep. 313.

Pleadings.— The pleadings being oral were reduced to writing by an order of the court to which the action was removed. The defendant in his answer interposed a counterclaim for a greater sum than that claimed in the court below, and in excess of the amount for which the District Courts could entertain jurisdiction. *Held*, that the service of the answer setting up a new defense and a counterclaim for a larger sum without leave of the court was unauthorized. *Walker* v. *Scott*, 3 Misc. Rep. 329; s. c., 53 N. Y. St. Rep. 632. See also opinion in *Smith* v. *White*, 23 N. Y. 574.

The oral pleadings upon the removal of the cause to the City Court become the pleadings to the latter, and upon its order to reduce them to writing, the defendant should answer as he did below, and an objection that the complaint does not conform to the oral complaint should be taken by answer, and not by demurrer. *Davis* v. *Bingham*, 32 Misc. Rep. 777, 66 N. Y. Supp. 489.

No change of issues.—An action, after removal, cannot be changed in its character by that court or by a referee. The issues created by the pleadings in the court below are those to be tried on its removal to this court, and it continues in all respects to be an action of the court below, the trial of which is to be had in the court to which the action was removed. The issues cannot be so changed that a subject not of original jurisdiction may be litigated against the consent of one of the parties. *Smith* v. *White*, 23 N. Y. 572; *Salter* v. *Parkhurst*, 2 Daly, 240; *Fagan* v. *Boar*, 11 Civ. Proc. Rep. 220.

Poor person; new order.— The court to which the action was removed has exclusive jurisdiction of the action and all proceedings thereunder, and if the plaintiff desires to proceed in it as a poor person, a new order must be obtained. A party to whom leave has been granted to sue as a poor person who neglects to call the attention of his opponent or the court to the order, until after entry of judgment and taxation of costs, loses all rights under the order. *Oakes* v. *High*, 11 Misc. Rep. 313.

Recovery can not be had beyond the amount stated in the complaint, as it is this sum that limited the jurisdiction of the justice under section 3215 of the Code of Civil Procedure. *Ives* v. *Quinn*, 7 Misc. Rep. 660; s. c., 58 N. Y. St. Rep. 390, 28 N. Y. Supp. 267.

Security for costs cannot be required on the ground of plaintiff's non-residence in an action removed. *Hames* v. *Judd*, 30 N. Y. St. Rep. 666; s. c., 18 Civ. Proc. Rep. 324. 9 N. Y Supp. 743.

Supplemental answer cannot be served in an action removed. But an amendment of the answer may be allowed on terms. *Meyers* v. *Rosenbach*, 7 Misc. Rep. 560; *Russell* v. *Ruckman*, 3 E. D. Smith, 419.

§ 4. **Contempt of court; criminal.**— The said court has power to punish for a criminal contempt, a person guilty of either of the following acts and no others:

1. Disorderly, contemptuous or insolent behavior, committed during its sitting, in its immediate view and presence, and directly tending to interrupt its proceedings, or to impair the respect due to its authority.

2. Breach of the peace, noise or other disturbance directly tending to interrupt its proceedings.

3. Wilful disobedience to its lawful mandate.

4. Resistance wilfully offered to its lawful mandates.

5. Contumacious and unlawful refusal to be sworn as a witness, or after being sworn, to answer any legal and proper interrogatory.

6. Publication of a false or grossly inaccurate report of its proceedings. But a court cannot punish as a contempt, the publication of a true, full and fair report of a trial, argument, decision or other proceeding thereon.

§ 5. **Punishment.**— Punishment for a contempt, specified in the last section, may be by fine, not exceeding two hundred and fifty dollars, or by imprisonment not exceeding thirty days, in the jail of the county where the court is sitting, or both, in the discretion of the court. Where a person is committed to jail, for the non-payment of such a fine, he must be discharged at the expiration of thirty days; but where he is also committed for a definite time, the thirty days must be computed from the expiration of the definite time.

§ 6. **In view of court; how punished.**— Such a contempt, committed in the immediate view and presence of the court, may be punished summarily. When not so committed, the party charged must be notified of the accusation, and have a reasonable time to make a defence, and the court may issue a warrant directed generally to any marshal requiring him to bring the offender before the court. Where a person is committed for such a contempt, the particular circumstance of his offence must be set forth in the mandate of commitment.

§ 7. **Preceding three sections limited.**— Punishment for a contempt, as herein prescribed, does not bar an indictment for the same offence; but where a person who has been so punished is convicted on such an indictment, the courts in sentencing him, must take into consideration the previous punishment.

§ 8. **Contempts punishable civilly.**— The court has power to punish, by fine and imprisonment, or either, a neglect or violation of duty, or other misconduct, by which a right or remedy of a party to a civil action or special proceeding, pending in the court may be defeated, impaired, impeded, or prejudiced, in either of the following cases:

1. An attorney, counsellor, clerk, sheriff, marshal, coroner, or other person, in any manner duly selected or appointed to perform a judicial or ministerial service, for a misbehavior in his office or trust, or for a wilful neglect or violation of duty therein; or for disobedience to a lawful mandate of the court, or of a judge thereof, or of an officer authorized to perform the duties of such a judge.

2. A party to the action or special proceeding, for putting in fictitious bail or a fictitious surety, or for any deceit or abuse of a mandate or proceeding of the court.

3. A party to the action or special proceeding, an attorney, counsellor, or other person, for the non-payment of a sum of money ordered or adjudged by the court to be paid, in a case where by law execution cannot be awarded for the collection of such sum; or for any other disobedience to a lawful mandate of the court.

4. A person for assuming to be an attorney or counsellor, or other officer of the court, and acting as such without authority; for rescuing any property or person in the custody of an officer, by virtue of a mandate of the court; for unlawfully detaining or fraudulently preventing, or disabling from attending or testifying, a witness, or a party to the action or special proceeding, while going to, remaining at, or returning from, the sitting where it is noticed for trial or

hearing; and for any other unlawful interference with the proceedings therein.

5. A person subpœnaed as a witness, for refusing or neglecting to obey the subpœna, or to attend, or to be sworn or to answer as witness.

6. A person duly notified to attend as a juror at a term of the court, for improperly conversing with a party to an action or special proceeding, to be tried at that term, or with any other person in relation to the merits of that action or special proceeding; or for receiving a communication from any other person, in relation to the merits of such an action or special proceeding, without immediately disclosing the same to the court.

7. In any other case where an attachment or any other proceeding to punish for a contempt, has been usually adopted and practiced in a court of record, to enforce a civil remedy of a party to an action, or special proceeding in that court, or to protect the right of a party.

Notes to sections 4, 5, 6, 7, and 8.

With the exception of the preamble, section 4 with its six subdivisions is the same as section 8 of the Code of Civil Procedure, which was applied to this court by section 1369 of the Charter of 1897, as amended in 1901, and Laws 1882, chap. 410 (Consolidation Act), § 1288.

Section 5 is the same as section 9 of the Code of Civil Procedure without change, and was also made applicable by the Charter of 1897 as amended in 1901, and Consolidation Act (Laws 1882, chap. 410), § 1288.

Section 6 is composed of sections 10 and 11 of the Code of Civil Procedure, with the exception of the provision in reference to the marshal.

Section 7 is substantially new, and takes the place of section 12 of the Code of Civil Procedure.

Section 8 with its seven subdivisions is substantially the same as section 14 of the Code of Civil Procedure with its eight subdivisions omitting the seventh subdivision.

Answer; striking out.— The court has power to strike out an answer of a defendant as punishment for a contempt. *Socialistic Co-operative Publishing Co.* v. *Kuhn*, 51 App. Div. 583.

Appeal; the adjudication final.— If there is jurisdiction to commit for contempt, the adjudication upon the question of contempt is final, and cannot be reviewed on appeal. *Mitchell's Case*, 12 Abb. Pr. 249.

Attachment.— A warrant of attachment for contempt need not recite the contempt nor any of the proceedings upon which the warrant rests. *People ex rel. Pond* v. *Tamsen*, 15 Misc. Rep. 365.

Attorney's privilege.— The refusal to produce papers acknowledged to be in his possession, for the reason that it would be a breach of his privilege as attorney, is assuming the right of determining for himself the question of privilege, which is not his province, but that of the court; and his refusal to produce the papers is contempt, for which he can be punished. *Mitchell's Case*, 12 Abb. Pr. 249.

Writing letter to judge.— The writing of a letter by an attorney to a judge, scandalizing his decision, is gross misconduct, but not a criminal contempt. *In re Griffin*, 15 N. Y. St. Rep. 400; *Matter of Wilkes*, 24 N. Y. St. Rep. 292.

Interrupting trial.— The authority to punish counsel for contempt of court in interrupting the proceedings in a trial pertains solely and exclusively to the court in which it occurs, in its immediate view and presence. *Heerdt* v. *Wetmore*, 2 Robt. 697.

Civil and criminal contempts; distinction.— Revised Statutes distinguished, and the Code of Civil Procedure preserves the distinction between criminal contempts and proceedings as for contempts in civil actions. As it respects disobedience to the orders of the court, the sole difference appears to be that a willful disobedience is a criminal contempt, while a mere disobedience by which the right of a party is defeated or hindered is treated otherwise. *People* v. *Dwyer*, 90 N. Y. 407, 2 Civ. Proc. Rep. 379.

Civil contempts; punishment.— The proceedings to punish for civil contempts under section 8 of this act (being the same as section 14 of the Code of Civil Procedure) would be provided for by title III, sections 2266 to 2292 of the Code of Civil Procedure, but by section 2266 of said Code these sections apply to courts of record, and there is no provision in the present act making them applicable to this court, except perhaps by section 20.

Commitment; requisites of the.— Must designate the particular misconduct of which the defendant is convicted. *De Witt* v. *Dennis*, 30 How. Pr. 131. And see Code Civ. Proc., § 2874.

A commitment for contempt in not delivering possession of property pursuant to order of court must show on its face that the person committed had possession or control of the property. After a commitment has been adjudged void, on habeas corpus, the papers on which it was granted are *functus officio*, and a new motion should be made if a new commitment is sought. *People ex rel. Walter* v. *Conover*, 15 Abb. N. S. 430.

On a refusal to answer a material question, it must appear by the warrant of commitment or by the evidence that an oath was made of the materiality of the testimony. *Rutherford* v. *Holmes*, 66 N. Y. 368.

Court; keeping it open.— The justice has power to hold the court open for the return of an attachment against the witness. *Board of Excise* v. *Saekrider*, 35 N. Y. 154.

Court must issue the mandate for contempt, and not a judge of the court. *People* v. *Gilmore*, 26 Hun, 1; s. c., 88 N. Y. 626.

Definitions.— For a definition of the word "mandate" in these sections, see § 3343, subd. 2; for "judge," see subd. 3; for "action," see § 3333; and for the definition of the words "special proceedings," see Code Civ. Proc., § 3334.

Disorderly behavior.— The powers of justices are ample to repress and punish disorderly behavior in their courts, whether proceeding from a party or his counsel or a bystander. *Onderdonk* v. *Ranlett*, 3 Hill, 323.

Docket.— The validity of conviction is not affected by the omission of the justice to enter in his docket the minute thereof made up by him. *Robins v. Gorham*, 25 N. Y. 588, affg. s. c., 26 Barb. 586.

Excuse.— That the order disobeyed was erroneously granted is no excuse for disobedience of the same. The party who disobeys the order is guilty unless it is void on its face from an utter want of jurisdiction. *Erie Ry. Co.* v. *Ramsey*, 45 N. Y. 637, affg. 3 Lans. 178; *Higbie* v. *Edgerton*, 3 Paige, 253; *Smith* v. *Reno*, 6 How. 124; *Arctic Fire Ins. Co.* v. *Hicks*, 7 Abb. 204; *Sullivan* v. *Judah*, 4 Paige, 444; *Grimm* v. *Grimm*, 1 E. D. Smith, 190; *People* v. *Bergen*, 53 N. Y. 404, 15 Abb. N. S. 97; *People* v. *Sturtevant*, 9 N. Y. 263, affg. 1 Duer, 512; *People ex rel. Garrett* v. *Ruck*, 76 N. Y. 294.

The direction of a third person does not protect a party from punishment. *Krom* v. *Hogan*, 4 How. 225. Though it may be considered as bearing upon the extent of the punishment. *Matter of Fitton*, 16 How. 303.

As to constructive resistance by orders given to a servant, etc., see *People* v. *Gilmore*, 26 Hun, 1; s. c., 88 N. Y. 626.

False swearing; perjury; sureties.— A surety to an undertaking who falsely swears that he is worth double the penalty of the undertaking is guilty of perjury, which is a contempt of court, and may be punished therefor by a fine sufficient to indemnify the defendant for the loss and injury he has sustained thereby, and by imprisoning him for six months and until the fine is paid. *Stephenson* v. *Hanson*, 6 Civ. Proc. Rep. 43; *Eagan* v. *Lynch*, 3 Civ. Proc. Rep. 236.

Falsely justifying as surety on order of arrest punishable as a contempt. *Keating* v. *Goddard*, 8 Civ. Proc. Rep. 377.

One who becomes surety upon an undertaking on appeal, knowing that he is insolvent, and with no expectation of paying the liability thus incurred, is guilty of a contempt of court, in putting in a fictitious surety, and may be punished therefor, although he is not a party to the action. *Simon* v. *Aldine Pub. Co.*, 14 Daly, 280, affg. 8 N. Y. St. Rep. 334.

In a proceeding to punish a surety for contempt in swearing falsely as to his property on justification, the burden of proof rests on the plaintiff and is not shifted by an attack on his proof in denial of the charge. *Schmidt* v. *Livingston*, 20 Misc. Rep. 324, 45 N. Y. Supp. (79 St. Rep.) 915, affg. 19 Misc. Rep. 353, 43 N. Y. Supp. 494.

False justification of a surety on an indemnity bond is not punishable as a contempt under section 14 of the Code in favor of a person not a party to the action whose property has been levied upon by the sheriff under an attachment, and who subsequently sues for conversion. *Schrieber* v. *Raymond & Campbell Mfg. Co.*, 18 App. Div. 158, 26 Civ. Proc. Rep. 290; *Schrieber* v. *Sanford*, 45 N. Y. Supp. 442.

One who offers himself as a surety knowing himself to be insolvent, and with no expectation of paying the liability thus incurred, is guilty of contempt and may be punished. *Nathans* v. *Hope*, 5 Civ. Proc. Rep. 401. See *contra*, *Norwood* v. *Ray Mfg. Co.*, 11 Civ. Proc. Rep. 273.

A fraudulent surety on a bail bond may be punished when he attempts to justify and is shown incompetent and worthless. *Diamond* v. *Knoepel*, 3 N. Y. St. Rep. 291.

An owner of premises who procures the discharge of a mechanic's lien by giving a bond with sureties whom he knows to be insufficient to justify is guilty of contempt of court, and may be punished by a fine equal to the amount of the bond. *McAveney* v. *Brush et al.*, 13 Misc. Rep. 79; s. c., 1 App. Div. 97.

The making of a false affidavit as to his sufficiency by a surety upon a bond given to discharge a mechanic's lien is a contempt of court though he was not examined at the time of his justification, and will be punished accordingly. *Matter of Sheppard*, 33 Misc. Rep. 724.

A surety on an appeal bond who make false affidavit as to his responsibility, in order to deceive the court under section 14 of the Code of Civil Procedure, is guilty of contempt. *Buffalo Loan Co.* v. *Medina Gas Co.*, 68 App. Div. 414.

False verification of answer.— A false verification of an answer is not punishable as a contempt of court. *Hoffat* v. *Herman*, 1 N. Y. St. Rep. 97, 8 Civ. Proc. Rep. 369; affd., 116 N. Y. 131, 26 N. Y. St. Rep. 329, 17 Civ. Proc. Rep. 357.

The interposition, by a party to an action, of a false verified answer, is not a "deceit or abuse of a mandate or proceeding of the court," within the meaning of subdivision 2 of section 14 of the Code of Civil Procedure, and therefore is not punishable as a contempt. *Fromme* v. *Gray*, 148 N. Y. 695; s. c., 14 Misc. Rep. 592. See also *People* v. *Tamsen*, 17 Misc. Rep. 212.

Furnishing false testimony.— The conduct of an "accident adjuster," employing his time in discovering accidents and in inducing the injured to go to a lawyer of his selection in furnishing to proposed witnesses for the plaintiff, in an accident predicated on the negligence of a street railway corporation, typewritten statements of false testi-

mony which they were to give upon the trial, is strongly to be condemned; but where the defendant succeeded upon the trial, the court considered that a motion to punish the "accident adjuster" for a civil contempt, under section 14 of the Code of Civil Procedure, must be denied, as his conduct could not be said to have defeated, impaired, impeded, or prejudiced the right of the defendant. *Noster* v. *Metropolitan St. Ry. Co.*, 30 Misc. Rep. 722.

Juror; misconduct of.— Where, during a criminal trial, a juryman went during recess to the scene of the affray without the permission of the court, for the purpose of acquainting himself with the locality and surroundings, he is not guilty of a criminal contempt for which he would be summarily punished by the court. *People* v. *Oyer and Terminer*, 101 N. Y. 245, 3 How. N. S. 413.

Where the juror makes default in attendance, he may summarily be brought before the court for punishment. *Robbins* v. *Gorham*, 25 N. Y. 588; *Board of Excise* v. *Sackrider*, 35 N. Y. 154.

Marshal.— It seems that a sheriff who refuses to receive a warrant of attachment delivered to him on a Sunday afternoon, and promises, but fails, to go himself or send a deputy to see one of the plaintiff's attorneys later in the day, is guilty of contempt. *Dailey* v. *Fenton*, 47 App. Div. 418, 62 N. Y. Supp. (96 St. Rep.) 337.

Misnomer.— A person whose name is wrongfully stated will not be adjudged in contempt for failing to obey an order, though he is not the person intended, if he has not appeared in the action. *Muldon* v. *Pierz*, 1 Abb. N. C. 309.

Failure to repay into court money paid to defendant under a judgment, when so ordered upon a reversal of the judgment, is a contempt which may be enforced by commitment. *Devlin* v. *Hinman*, 40 App. Div. 101.

Nonpayment of money.— Disobedience of an order requiring the payment of money into court, or to an officer thereof, except where it is due upon contract, or for a breach thereof, may be punished as for a contempt, although the amount thereof could be collected upon execution. *People ex rel. Pond* v. *Tamsen*, 15 Misc. Rep. 365.

Order; requisites of; adjudication, etc.— An order adjudging a party guilty of a civil contempt which omits to state that it had been determined that the misconduct defeated, impaired, impeded, or prejudiced the rights or remedies of the other party to the proceedings is fatally defective. *Wolfe et al.* v. *Knight*, 15 Misc. Rep. 438.

To warrant punishment for contempt in disobeying a judgment or order, the mandate must be clearly expressed, so that it may appear with reasonable certainty that it has been violated. *Ketchum* v. *Edwards*, 153 N. Y. 534, revg. 6 App. Div. 160, 39 N. Y. Supp. 1012.

An order punishing a person for a civil contempt which does not adjudge that he committed the act claimed to constitute the contempt, or that such act was calculated to, or actually did, defeat, impair,

impede, or prejudice the rights or liabilities of the moving party, is fatally defective. *Dailey* v. *Fenton*, 47 App. Div. 418, 62 N. Y. Supp. (96 St. Rep.) 337.

An order punishing a party for contempt in a civil action must contain an adjudication that he is guilty of a contempt, and also that his act not only has a tendency to, but actually does, defeat, impair, impede, or prejudice the rights or remedies of the party complaining; and a mere recital that the answer is stricken out "for the willful and contumacious disobedience of the defendants of the order of injunction herein, dated September 1, 1899, and for their contempt of this court," is insufficient. *Socialistic Co-operative Pub. Co.* v. *Kuhn*, 51 App. Div. 583, 64 N. Y. Supp. (98 St. Rep.) 933.

Order; service of; failure to obey.— To authorize punishment of a party for contempt in disobeying an order, such order must have been served upon him personally. *Matter of Seibert*, 30 Misc. Rep. 680.

Out of sight of the judge.— A contempt committed in the presence of the jury while deliberating upon their verdict, out of the sight and hearing of the judge, is in law committed in the presence of the court. *People* v. *Barrett*, 30 N. Y. St. Rep. 728, 18 Civ. Proc. Rep. 230.

Where a contempt has been committed in the presence of the court, but which the judge has failed to see, he is not obliged to proceed thereon without proofs or process, and the proofs must be presented to him in a legal and formal manner. *People* v. *Barrett*, 56 Hun, 351.

Perjury is a contempt and may be punished as such. *Eagan* v. *Lynch*, 3 Civ. Proc. Rep. 236. See also "False Swearing," above.

Punishment.— Under Code Civ. Proc., § 2284, the court may limit the punishment for contempt to a fine alone, though the act refused to be performed be one which it is still in the power of the offender to do, and if the order of commitment does not direct the imprisonment of the prisoner for any time whatever after payment of the fine, the sheriff may properly discharge him after the expiration of six months. *Hommel* v. *Buttling*, 46 App. Div. 206.

Evidence of loss; punishment.— Where the fine imposed was not under the statute (Code Civ. Proc., § 2284), but simply an indemnity for plaintiff's loss, of which there was no evidence,— *Held*, that the order should be reversed. *Donohue* v. *Lyons*, 30 App. Div. 622. See also *Burnham* v. *Denike*, 53 App. Div. 407, 65 N. Y. Supp. 1028.

Stay of proceedings; disregard of, contained in an order to show cause why an amendment of pleadings should not be allowed, by moving the case for trial at the term for which it had been noticed, is a contempt of court. *Oakley* v. *Cokalete*, 20 Misc. Rep. 206; revd., 16 App. Div. 65, 44 N. Y. Supp. (78 St. Rep.) 1070. See also *Sheffield* v. *Cooper*, 21 App. Div. 518.

Stenographer may be punished for contempt for wrongfully refusing to deliver a copy of his minutes unless paid in excess of the statutory rate. *Cavanagh* v. *O'Neill*, 20 Misc. Rep. 233.

Subpœna.— Refusal of party to action under subpœna to produce paper may be punished as a contempt. *Shelp* v. *Morrison*, 13 Hun, 110.

Summary commitment.— Where a contempt has been committed in the presence of the court, creating a disturbance and disobedience of the orders of the court, an alternative order is not necessary, but the court may commit the offender summarily. *Matter of Falkenberg* v. *Frank*, 20 Misc. Rep. 692; s. c., *Falkenberg* v. *Frank*, 45 N. Y. Supp. (79 St. Rep.) 1126.

Technical contempt.— The court may hear a motion although the moving party is in technical contempt of court, as the court has the right to forgive or overlook such contempt if neither party is injured thereby. *Whitman* v. *Johnson*, 10 Misc. Rep. 730; *People ex rel. Baldwin* v. *Miller*, 9 Misc. Rep. 1.

Witness or juror; refusal to attend, or to be sworn, or to answer a material question.— The summary proceeding for the punishment of a defaulting witness or juror may be had after the termination of the suit in which the default occurred. The justice may issue a warrant to bring the offender before him. A previous summons is unnecessary. A process commanding the officer to attach the defaulting juror and bring him before the justice is a warrant in substance, and sufficient. *Robbins* v. *Gorham*, 25 N. Y. 588; *Board of Excise* v. *Sackrider*, 35 N. Y. 154.

The contumacious and unlawful refusal of a person who has been sworn as a witness to answer any legal and proper interrogatory may be punished criminally or civilly. *People* v. *Davidson*, 35 Hun, 471.

And so failure to attend after tender of fees. *Andrews* v. *Andrews*, 2 Johns. Cas. 109; Code Civ. Proc., § 853.

In order to give the court jurisdiction to punish a witness for contempt for refusing to answer a proper and pertinent question, there must be an oath of the party, at whose instance he attended, of the materiality of the testimony (2 R. S. 274, § 279), and a justice is liable in an action for false imprisonment at the suit of one imprisoned under and in pursuance of his warrant of commitment for such a contempt, where it does not appear in the warrant or by the evidence that such an oath was made.

It is immaterial that the witness was a party sworn in his own behalf, that the question he refused to answer was asked upon cross-examination, and that it was therefore impossible to meet the requirements of the statute; this does not authorize a disregard of it.

It seems that in case of such refusal to answer, the remedy of the opposite party is to move to strike out the direct examination. *Rutherford* v. *Holmes*, 66 N. Y. 368.

Where the witness admits his refusal to answer questions and seeks to justify, the filing of interrogatories is unnecessary. *Clapp* v. *Lathrop*, 14 Abb. Pr. 423.

Immaterial and irrelevant question.— Cannot be punished for contempt, for refusal to answer a question immaterial or irrelevant to the issue upon the trial whereof he is examined. *Matter of Odell*, 6 Den. 344.

Willful contempt mandate must be signed by court.— To render a person guilty of a contempt, the mandate must have been issued by the court and not a judge thereof. *People* v. *Gilmore*, 26 Hun, 1; s. c., 88 N. Y. 626.

§ 9. **Process; where service may be made.**— The court shall have power to send its process and other mandates in an action or special proceeding of which it has jurisdiction to any part of the city of New York for service or execution, and to enforce obedience thereto, and the power and authority of said court extends to the whole of said city of New York, without limitation, except as expressly prescribed in this act.

Notes to section 9.

This section is substantially section 1368 of the Charter (Laws 1897, chap. 378, as amended in 1901), and part of it is taken from section 1369 of said Charter.

It makes plain the jurisdiction of the court as to the service of process in the five boroughs of the city of New York, whose territorial extension and limits under the Charter are contained in sections 1 and 2 thereof.

Mechanic's lien action.— In an action to enforce a mechanic's lien against real property brought in a court not of record, it shall be commenced by the personal service upon the owner, *anywhere in the state*, of a summons and complaint. See § 3404, Code Civ. Proc., which was added by Laws 1897, chap. 419.

§ 10. **Justice to administer oaths, et cetera.**— The justices of said court may, in the city of New York, by virtue of their office, administer oaths, take depositions and acknowledgments, and certify the same in the manner and with like effect as justices of courts of record.

Notes to section 10.

This section is substantially the same as section 1379 of the Charter of 1897, as amended in 1901, which applied sections 914 to 917 and section 3319, Code of Civil Procedure, to the justices of this court,

giving them the same power to administer oaths as justices of courts of record as now stated in this section.

The sections of the Code of Civil Procedure above specified are as follows:

IN WHAT CASES DEPOSITIONS MAY BE TAKEN.

§ 914. **Code of Civil Procedure.**— A party to an action, suit or special proceeding, civil or criminal, pending in a court without the State, either in the United States, or in a foreign country, may obtain, by the special proceeding prescribed in this article, the testimony of a witness and in connection therewith, the production of books and papers within the State to be used in the action, suit or special proceeding.

Note.

The article referred to in this section is *article* 3, *title* 3, *chapter* 9, entitled "Depositions taken within the State, for use without the State."

SUBPŒNA TO WITNESS.

§ 915. **Code of Civil Procedure.**— Where a commission to take testimony, within the State, has been issued from the court, in which the action, suit, or special proceeding is pending; or where a notice has been given, or any other proceeding has been taken, for the purpose of taking the testimony, within the State, pursuant to the laws of the State or country, wherein the court is located, or pursuant to the laws of the United States, if it is a court of the United States. The Supreme Court, or the County Court, or a judge of either court, shall in a proper case, on the presentation of a verified petition, issue a subpœna to the witness, commanding him to appear before the commissioner, named in the commission; or before a commissioner, within the state, for the state, territory, or foreign country, in which the notice was given, or the proceeding taken; or before the officer designated in the commission, notice, or other paper, by his title of office; at a time and place specified in the subpœna, to testify in the action, suit, or special proceeding. If the witness shall fail to obey the subpœna, or refuse to have an oath administered, or to testify, or to produce a book or paper pursuant to a subpœna, or to subscribe his deposition, the court or judge issuing the subpœna shall, if it is determined that a contempt has been committed, prescribe the punishment as in the case of a recalcitrant witness in the Supreme Court. The general rules of practice must prescribe rules for such proceedings.

Sections 916, 917, 918 were repealed by Laws 1899, chap. 502.

§ 919. **Code of Civil Procedure.**— The officer, or commissioner, before whom a witness appears, in a case specified in this article, must take down his testimony, in writing, and must annex thereto copies of all books and papers produced or such parts thereof as shall be required,

and must certify and transmit it to the court in which the action, suit, or special proceeding is pending, as the practice of that court requires.

WITNESS FEES ON DEPOSITION TO BE USED IN ANOTHER STATE.

§ 3319. **Code of Civil Procedure.**— A witness, attending before a commissioner or an officer, authorized to take his deposition to be used without the State, in a case other than one specified in section 3327 of this act, is entitled to two dollars for each day's actual attendance, and to eight cents for each mile going to the place of attendance.

Code Civil Procedure, section 332, is as follows:

Justice's court; witness fees.— A witness is entitled to twenty-five cents for each day's actual attendance, before a justice of the peace in an action or special proceeding, or before a commissioner appointed by a justice of the peace, or before a justice of the peace taking a deposition to be used in a court not of record, of another State, or a territory of the United States.

§ 11. **Board of justices.**— The justices of said court shall constitute the board of justices of the municipal court and discharge the functions thereof. They may elect a president from their own number and at pleasure remove him and elect a successor. All meetings of said board shall be public and all proceedings shall be recorded in its books of minutes, by its secretary and shall be preserved. Such board may designate a clerk of said court for one of said districts to act as secretary of said board, and from time to time substitute another and fix a compensation to be paid for such service, not exceeding the sum of five hundred dollars per annum. Such board shall establish public rules relative to its meetings, which as far as possible shall be held at regular times, to the keeping and preservation of its minutes and to the public inspection of the same under the care of the secretary at reasonable times.

Notes to section 11.

This section is substantially the same as section 1374 of the Charter of 1897, as amended in 1901, with the exception of the reference to the appointment of clerks, etc., in the public rules which the board shall make as that matter is provided for in section 1373 of the said Charter, which has been left unrepealed, and undisposed of in this act, but preserved as a Charter enactment. It should be observed and remembered that all meetings of the board shall be public, for which it shall establish rules, which as far as possible shall be held at

regular times, and the minutes of the board may be inspected by the public.

By section 14 the concurrence of a majority of the board shall be necessary to adopt any resolution thereof.

§ 12. **Board to make rules.**— Said board of justices shall adopt, and from time to time may amend or add to rules relating to the following subjects:

1. As to the hours at which court shall be opened on each day, and what officers shall be in attendance.
2. As to the order of business and manner of its discharge.
3. As to the manner in which the clerks, assistant clerks, stenographers, interpreters, attendants and employees, shall perform their duties, the manner of keeping records and papers, the collection and disposition of moneys and keeping accounts of the same.
4. As to the maintenance of order in and about the courts and offices thereof.
5. As to the forms and practice in said court.

Notes to section 12.

This section is constructed from section 1375 of the Charter (Laws 1897, chap. 378, as amended in 1901) omitting the making of the rule for a rotation of the justices in holding court, and assigning them to the different courts. By the next section the justice is to regularly hold court in the district for which he was elected or appointed. In addition to the rules required to be made by the board by this section the board is also required by the preceding section 11 to establish "*public rules*" relating to its meetings, which perhaps should have been included in this section.

By section 14 the concurrence of a majority of the board shall be necessary to adopt any resolution thereof.

Fees.— This section, authorizing the board to make rules as to the hours and order of business, does not empower them to create and exact fees, and therefore a rule by such board requiring plaintiff to pay a fee of two dollars before judgment entered or before issue is joined, or the case put on the calendar and called, to be refunded in case issue is not joined, is void, and a plaintiff who had filed a verified complaint for goods sold, defendant being in default, was entitled to mandamus to compel the entry of judgment without the payment of such fee. *In re Hale*, 32 Misc. Rep. 104; s. c., 65 N. Y. Supp. 449.

Pursuant to section 12 the board of justices adopted the following rules to take effect September 1, 1902:

RULES OF PRACTICE.

(Adopted June 19, 1902.)

I. Court shall be held in each district on Monday, Tuesday, Wednesday, Thursday, and Friday of each week, except in those districts where the justice elected or appointed therein shall otherwise direct.

II. Court shall be opened at 10 o'clock, A. M.

III. The order of business in each court shall be as follows:

1. Summary proceedings.
2. Adjourned causes.
3. Returned causes.
4. Inquests.
5. Motions.
6. Trials.

IV. To entitle a cause to a place on the calendar, the summons must be returned with proof of service thereof to the clerk's office, and the calendar fee paid the day before the return day of the summons.

V. Where a plaintiff appears by attorney, the summons, unless a complaint is filed therewith, shall be indorsed with the name and address of the attorney for the plaintiff and a brief statement of the cause of action. Such indorsement shall be deemed an appearance within section 332 of the Municipal Court Act. Other process, pleadings, and writings shall also be appropriately indorsed.

VI. When a bill of particulars is ordered, the same shall be filed in the clerk's office within three days after such order is made.

VII. When a jury is demanded, the jury fee shall be forthwith paid to the clerk of the court by the attorney, or party making such demand. The jury shall be publicly drawn by the clerk from the panel under the supervision of the justice. Each additional venire requires an additional jury fee, but only the fee originally paid can be included as part of the costs in the judgment under section 238 of the Municipal Court Act.

VIII. If the original summons, or other process, or mandate of the court is not returned to the office of the clerk the court may indorse a dismissal of the action or proceeding upon the copy of such summons, mandate, or process, or grant other appropriate relief, and award costs in proper cases, and such copy summons, mandate, or process with such indorsement shall thereupon be filed with the clerk of the court, and shall have the same effect as if the original had been so indorsed and

filed, provided proof of service is made or written notice of appearance by an attorney is filed.

IX. Upon an application for an order removing an action to the City Court, County Court, or Supreme Court, as the case may be, the sureties upon the undertaking must attend and justify as to their sufficiency on the day of the presentation of the undertaking unless such justification is waived or adjourned by the court or by consent, or the undertaking is given by a duly authorized surety company.

X. The clerk shall not place a cause upon the calendar for trial on a day agreed upon in a stipulation unless such stipulation is approved by the justice in the district in which the action is pending.

XI. Causes set down for trial must be tried when reached unless legal grounds exist for an adjournment.

XII. Only one adjournment shall be granted in actions in which the amount claimed in the summons does not exceed $50, unless the justice for good cause shown shall otherwise direct.

XIII. Calendar or other fees paid to the clerk are in no case to be returned.

XIV. Motions may be brought on for hearing on not less than three days' notice unless otherwise provided by law.

XV. Ex parte applications may be made to any justice without regard to the district in which the action or proceeding is pending, or about to be commenced; the affidavit shall however state whether any previous application has been made, and if made, to what justice and what order or decision was made thereon, and what new facts, if any, are claimed to be shown. It shall also state the residences of the parties. For failure to comply with this rule any order made on such application may be revoked or set aside. The denial of an ex parte application with the reason therefor may be indorsed thereon by the justice to whom the same is presented.

XVI. No approval of an undertaking given by a party or claimant to procure the discharge of a levy under an attachment shall be granted ex parte. The party or claimant applying for such approval shall give at least two days' notice of justification to the adverse party.

XVII. A stipulation to extend the time of the court within which to render a judgment or make a decision may be entered into between parties or their attorneys on the record in the minutes of a trial, or in a written stipulation signed to that effect.

XVIII. Affidavits of service of process must in all cases comply strictly with the provisions of rule XVIII of the Supreme Court Rules.

XIX. Costs shall not be awarded to a defendant who appears by attorney when there are no verified pleadings, unless a written notice of appearance is filed.

XX. The phrase "case on appeal" in sections 317 and 318 of the Municipal Court Act shall be deemed to refer simply to the justices' return on appeal as the same has been heretofore known. The phrase "including the evidence" shall be deemed to include all exhibits admitted in evidence.

XXI. In cases where attorneys may be represented by clerks, the clerk or clerks so appearing shall be only those whose certificates of clerkship shall have been filed in the office of the clerk of the Court of Appeals.

RULES RELATIVE TO CLERKS AND ATTENDANTS.

I. The clerk, assistant clerk, interpreter, and attendants of each court shall attend each day from 9 o'clock, A. M., to 4 o'clock, P. M., and at such other times as the justice may direct, except as otherwise provided by law. The stenographer shall be in attendance during the sessions of the court, and at such other times and places as the justice may direct.

II. The attendants shall maintain order in and about the court and the offices thereof.

III. The attendants and interpreter shall wear an official badge during the session of the court.

IV. During the session of the court the clerk thereof, or, in his absence, the assistant clerk, shall be in attendance therein, administer oaths, keep minutes and receive the verdict of a jury, and when not so employed the time of the clerk and assistant clerk shall be devoted to the business of the clerk's office.

V. The clerk of each court, or, in his absence, the assistant clerk, shall, on or before the third day of each month, make a statement in writing, duly verified by his oath, of moneys received for fees by him, as such clerk, during the preceding month, and on or before the day named pay into the finance department of the city of New York all such moneys received by him for the use, or on behalf of the city, for the preceding month as required by law. A summary thereof shall thereupon be filed with the secretary of the board of justices together with a detailed statement of the business of the court for the previous month.

VI. The clerks and assistant clerks shall keep and preserve full, correct, and true records of the proceedings of the court and of their office, properly file and preserve all process, pleadings, mandates, or other papers, deposit in bank all moneys paid to them, keep accurate accounts thereof, and shall faithfully perform the duties imposed upon them by chapter 580 of the Laws of 1902.

VII. When moneys are paid to persons other than parties or their attorneys the clerks shall require and file in their offices a written request from the party or the attorney entitled to such moneys to authorize such payment, and a receipt therefor.

§ 13. **Court; by whom held.**— A justice of the municipal court of the city of New York shall hold court in the district for which he was elected or appointed to fill a vacancy, but if a vacancy exists or the illness or inability of any justice prevents his attendance any other justice of said court may hold court in said district and, if at any time before or after the commencement of the trial, it shall appear to the satisfaction of the justice that he is a necessary witness in the trial of the cause, or otherwise disqualified to try the same, he shall, by an order entered in the cause, order the same and the papers in the same to be transferred to an adjoining district.

Note to section 13.

This section is constructed from part of section 1375 of the Charter (Laws 1897, chap. 378, as amended in 1901). "Board to make rules," which is now the title and subject-matter of section 12 of this act. See notes to § 12. By said section 1375 the board of justices were required to make rules as to which of the justices was to hold court in the different districts, and to provide for a rotation of the justices holding court. This has been abolished, and the justice now continues to hold court in the district for which the people elected him.

§ 14. **Concurrence of majority.**— The concurrence of a majority of all the members of said board shall be necessary to adopt any resolution thereof.

Note to section 14.

This section is the same as section 1376 of the Charter (Laws 1897, chap. 378, as amended in 1901).

§ 15. **Actions may be continued before another justice.**— The trial of an action or special proceeding may be continued from day to day, or from one day to any other day or days until the same is finished. A special proceeding commenced before one justice may be continued before any other justice having jurisdiction of the subject-matter, the same as though it had been originally commenced before him. A transcript of any proceedings had before either of said justices, or of any paper filed with the clerk, or of the minutes of any testimony taken by or before said justice, certified by the clerk or said justice to be correct, shall be presumptive evidence of the facts therein contained.

Notes to section 15.

This section is taken from the old District Court Act (Laws 1857, chap. 344, latter part of § 78), except the word "clerk" is substituted for the word "justice," and was section 1387 of the Consolidation Act (Laws 1882, chap. 410).

The heading of this section omits any mention of "Transcripts of proceedings, paper, or minutes," which is the subject of the second half thereof and which formed part of the heading of section 1387 of the said Consolidation Act.

It must be observed that only a "special proceeding" and not "an action" may be continued before another justice; "an action" is not included.

Conduct of trial.— See § 240.

§ 16. **Death or removal of justice not to impair proceedings, et cetera.**— No process, action, judgment, execution or proceeding shall abate or be discontinued by reason of the death, removal from office, or vacancy in office of any justice, but the respective successor in office of the said justice shall proceed to hear, try, determine and give judgment in and upon the same, and upon all matters and things pending before and undecided or not acted upon or indorsed by their predecessors in office, with the same powers, jurisdiction, and authority, as their predecessors had.

Notes to section 16.

This section is taken from the old District Court Act (Laws 1857, chap. 344). It is substantially the same as section 1390 of the Con-

solidation Act (Laws 1882, chap. 410), which was not repealed by the Charter, but is now repealed by this act.

By this section the successor of a justice has power to finish any matter or thing pending before or left undecided by his predecessor when out of office from any cause.

Term of office; finishing trial after.— A justice has no jurisdiction to finish the trial of a case, or to decide it, after the expiration of his term of office. The consent of the parties cannot give him power to do this. *In re Rudding*, 14 Civ. Proc. Rep. 47; *Rudding* v. *Kane*, 14 Daly, 535, 16 N. Y. St. Rep. 677; *Ovis* v. *Curtis*, 28 N. Y. Supp. 728.

The successor of a justice whose order has been reversed may rehear the motion and make a new order, containing the appropriate recital under section 1390 of the Consolidation Act as to the succession. *Stern* v. *Knapp*, 48 App. Div. 482, 62 N. Y. Supp. 982.

Returns to writs may be made by the justice after he is out of office, and they are valid. *Harris* v. *Whitney*, 6 How. Pr. 175; *Conover* v. *Develin*, 15 How. Pr. 470; s. c., 6 Abb. Pr. 228.

§ 17. **Court; where held.**— The said court shall be held in each of the districts by a justice of said court, at the places provided by the commissioners of the sinking fund, and in accordance with law, at such hours in every judicial day or so often as the board of justices of the municipal court shall direct, and must continue in session so long as the public interest requires; and it shall be the duty of the commissioners of the sinking fund to provide a suitable place for the holding of said court in each of said districts, provided that more than one place for holding such court may be provided at any time after this act takes effect in any district, if the said board of justices shall certify that the public convenience requires such additional number of places.

Notes to section 17.

This section is substantially the same as section 1371 of the Charter (Laws 1897, chap. 378, as amended in 1901), which superseded section 1291 of the Consolidation Act (Laws 1882, chap. 410), with the exception of the provision that the commissioners of the sinking fund are now to provide suitable places for holding the court, instead of the Municipal Assembly, the latter having been abolished by the Charter, as amended in 1901. See also § 19, and notes.

Clerk to keep his office open.— By section 282, subdivision 9, of this act, the clerk must keep his office open for the transaction of business

every judicial day, from 9 o'clock in the forenoon to 4 o'clock in the afternoon.

Holding courts in case of pestilence, war, or other public calamity.— See Charter, § 120.

Keeping court open.— The justice has power to hold the court open for the return of an attachment against the witness. *Board of Excise* v. *Sackrider*, 35 N. Y. 154.

Public holidays; half holidays.— The term "holidays" includes the following days in each year: The first day of January, known as New Year's day; the twelfth day of February, known as Lincoln's birthday; the twenty-second day of February, known as Washington's birthday; the thirtieth day of May, known as Memorial day; the fourth day of July, known as Independence day; the first Monday of September, known as Labor day, and the twenty-fifth day of December, known as Christmas day; and if either of such days is Sunday, the next day thereafter; each general election day and each day appointed by the President of the United States, or by the Governor of this State, as a day of general thanksgiving, general fasting, and prayer, or other general religious observances. The term "half-holiday" includes the period from noon to midnight of each Saturday which is not a holiday. The days and half-days aforesaid shall be considered as the first day of the week, commonly called Sunday, and as public holidays or half-holidays for all purposes whatsoever as regards the transaction of business in the public offices of this State or counties of this State. On all other days and half-days, excepting Sundays, such offices shall be kept open for the transaction of business.

Where a contract by its terms requires the payment of money or the performance of a condition on a public holiday, such payment may be made or condition performed on the next business day succeeding such holiday, with the same force and effect as if made or performed in accordance with the terms of the contract. Statutory Construction Act, § 24, as amended by chap. 39, Laws 1902. See also notes to §§ 31 and 37.

Saturday afternoon.— It shall be lawful for the county clerk, register, surrogate, and sheriff of the city and county of New York to close their respective offices at 1 o'clock in the afternoon on Saturday from the first day of July to the first day of October, both days included, in each year hereafter, *and the District Courts in said city and clerk's offices* thereof may also be closed on each Saturday at 1 o'clock in the afternoon during the same period in each year, provided such courts be not engaged in the actual trial or hearing of actions or proceedings. Laws 1887, chap. 185.

Under Laws 1887, chapter 185, it was held that a court was not a public office within the terms of that act, and the act does not prohibit the holding of court after 12 o'clock on Saturdays. *People* v. *Kearney*, 47 Hun, 129.

Sittings to be public.— The sittings of every court within this State shall be public, and every citizen may freely attend the same except in certain cases when the court may, in its discretion, exclude therefrom all persons who are not directly interested therein, excepting jurors, witnesses, and officers of the court. Code Civ. Proc., § 5.

Sunday.— A court shall not be opened, or transact any business on Sunday, except to receive a verdict or discharge a jury. An adjournment of a court on Saturday, unless made after a cause has been committed to a jury, must be to some other day than Sunday. But this section does not prevent the exercise of the jurisdiction of a magistrate, where it was necessary to preserve the peace, or in a criminal case to arrest, commit, or discharge a person charged with an offense. Code Civ. Proc., § 6. *People ex rel. Donohue* v. *Walton*, 35 Misc. Rep. 320.

§ 18. **Seals.**— The said court in each district shall have official seals furnished at the expense of the city, on which shall be engraved the arms of the state of New York, "Borough of Manhattan" (or whatever the borough may be), "First District" (or whatever the district may be), but nothing herein contained shall authorize such court to issue certificates of naturalization.

Notes to section 18.

This section is the same as section 1372 of the Charter (Laws 1897, chap. 378), as amended in 1901, which superseded section 1293 of the Consolidation Act (Laws 1882, chap. 410).

Seals were first provided for this court by Laws 1851, chap. 514, when it was known as "Justice's Court, First District" (or whatever district it was), "New York city."

What is sufficient sealing.— Section 29 of the Code of Civil Procedure provided how the seal of a court might be affixed. This section was repealed by section 13 of the Statutory Construction Law (Laws 1892, chap. 677), chapter 1 of the General Laws. Section 13 appertaining to the seal of a court is as follows:

"A seal of a court, public officer, or corporation, may be impressed directly upon the instrument or writing to be sealed, or upon wafer, wax or other adhesive substance affixed thereto, or upon paper or other similar substance affixed thereto by mucilage or other similar substance."

New seals.— Code Civ. Proc., § 30. When the seal of a court is so injured that it cannot be conveniently used, the court must cause it to be destroyed; and when the seal of the court is lost or destroyed, the

court must cause a new seal to be made, similar in all respects to the former seal, which shall become the seal of the court. The expense of a new seal for a county clerk, a surrogate's court, or a local court in a city, must be paid as part of the contingent expenses of the county, or the court, as the case requires. The expense of a new seal for any other court must be paid from the State treasury.

§ 19. **Access to court-houses.**— The justices of said court shall have access and possession of the court-houses; and it shall be the duty of the board of aldermen of the city of New York and its several officers charged with duties in that behalf to supply and pay for whatever may be necessary for the transaction of the business of said court, and the justices thereof, and to supply all proper accommodations, books, stationery and furniture, and to pay all salaries, compensations and expenses and disbursements herein authorized, and the board of estimate and apportionment shall annually include in its final estimate such sums as may be necessary to pay the same.

Note to section 19.

This section is substantially section 1380 of the Charter (Laws 1897, chap. 378), as amended in 1901. See also § 17 and notes.

§ 20. **Code, rules of supreme court applicable; when.**— The provisions of the code of civil procedure and rules and regulations of the supreme court as they may be from time to time, shall apply to the municipal court as far as the same can be made applicable, and are not in conflict with the provisions of this act; in case of such conflict this act shall govern.

Notes to section 20.

This section is taken from section 1377 of the Charter (Laws 1897, chap. 378), as amended in 1901, which superseded section 1426 of the Consolidation Act (Laws 1882, chap. 410).

There is a sweeping addition in this section to section 1377, in making the provisions of the Code of Civil Procedure also applicable to this court when not in conflict with the provisions of this act.

Rules of courts of record, how made and revised.— See § 17, Code Civ. Proc.

Rules to be published.— See § 18, Code Civ. Proc.

Construction.— The rules made by the court, under authority of the Code, may be considered as giving construction to the statute. *Myers* v. *Foeter*, 4 How. Pr. 241; *Matter of Wade*, 154 N. Y. 342.

Rules of court have the force and effect of statutes. *People ex rel.* v. *Nichols*, 18 Hun, 535; s. c., 79 N. Y. 582.

Discretion.— All matters of practice are in the first instance in the discretion of the courts in which the question of practice arises, yet matters of practice come after a while to be governed absolutely by the custom of the courts. *Fisher* v. *Gould*, 81 N. Y. 232.

Each court is the best judge of its own rules, and a higher court will not reverse any construction given to them not palpably erroneous. *Coleman* v. *Nantz*, 63 Pa. St. 178.

Disregarding.— The court may disregard its rules when a proper case is presented. *Clark* v. *Brooks*, 26 How. 285. This is so with a directory rule, but a mandatory rule must be followed. *Matter of Moore*, 108 N. Y. 280.

The true object of technical rules is to promote justice, or to punish injustice. When they fail of those ends courts should neither encourage nor enforce them. *People* v. *Tweed*, 5 Hun, 353; affd., 63 N. Y. 194.

Legality.— The judges cannot make law in making a rule, that belongs to the legislature. *Winston* v. *English*, 14 Abb. Pr. N. S. 124.

No general rules can be made inconsistent with the Code. *Rice* v. *Ehele et al.*, 55 N. Y. 524; *Lakey* v. *Cogswell*, 3 Code Rep. 116; *French* v. *Powers*, 80 N. Y. 146; *Palmer* v. *Phœnix Ins. Co.*, 22 Hun, 224; *Gomerly* v. *McGlynn*, 84 N. Y. 284.

A court rule cannot nullify a statute, and the latter must be interpreted and followed. *Glenny* v. *Stedwell*, 64 N. Y. 120.

Conflict with court decisions.— The justices in convention have power to make rules which are in conflict with the previous decisions of the court, regulating practice. *Havemeyer* v. *Ingersoll*, 12 Abb. Pr. N. S. 301.

NOTE.— There are no sections from 20 to 25.

TITLE II.

Actions; Summons; Parties.

SECTION 25. In what district brought.
26. Actions; how commenced.
27. Summons; requisites.
28. Form of summons.
29. Summons; corporation counsel may issue, et cetera.
30. Service; alias.
31. Method of service.
32. Order for service of summons, when defendant not found.
33. How such service must be made.
34. Papers to be filed; proof of service.
35. Defendant, when allowed to defend.
36. Who may serve summons, et cetera.
37. Return day.
38. Indorsement upon summons.
39. Indorsement upon summons where execution against the person may issue.
40. Parties; appearance of.
41. Guardian ad litem.
42. Parties; who may be joined.
43. Application of this article to defendants jointly liable.
44. Where employee is party.
45. Who may petition for leave to prosecute as a poor person.
46. Contents of petition.
47. Order and petition to be filed; when counsel assigned.
48. When leave may be annulled.
49. When defendant may defend as a poor person, et cetera.
50. Defendant's order.
51. Leave may be annulled as in cases of plaintiff.
52. Appeal where plaintiff or defendant poor person.
53. Costs in favor of petitioner.

§ 25. **In what district brought.**— An action or proceeding of which the municipal court has jurisdiction must be brought:

1. In a district in which either the plaintiff or defendant or one of the plaintiffs or one of the defendants resides, unless all the plaintiffs or all the defendants reside out of the city of New York, in which case the action or proceeding may be brought in said court in any district.

2. If the defendant be a corporation created by law, in a district in which the plaintiff or either of the plaintiffs resides, or in which (if it be a corporation) it transacts its general business or keeps an office or has an agency established for the transaction of business or is established by law, except the corporation of the city of New York, which may sue or be sued in any district, except as provided for in subdivision five of this section.

3. By plaintiffs not residing in the city of New York, in the district in which the defendant, or one of the defendants resides, and against a defendant or defendants, not residing in said city, in the district in which the plaintiff or one of the plaintiffs resides; but where all the parties reside out of said city, the action may be brought in any district. No person who shall have a place in said city for the regular transaction of business shall be deemed a non-resident under the provisions of this act.

4. If the district in which the action or proceeding is brought is not the proper district, the action may, notwithstanding, be tried therein, unless the action is transferred to the proper district before trial upon demand of the defendant made upon or before the joinder of issue in writing or in open court, followed by the consent of the plaintiff, given in like manner, or the order of the court. The demand must specify the district to which defendant requires the action to be transferred. The court must make such order when the district in which the action or proceeding is brought is not the proper district, as specified in this section or the next one, if such demand be made.

5. All actions by or on behalf of the city of New York to recover a penalty or fine for a violation of any corporation ordinance, when the amount of such penalty or fine shall not exceed five hundred dollars, must be brought in the district in which the violation of such ordinance happened or occurred. And all actions to recover a penalty or fine for a violation of any provision of the sanitary code or of any regulation of the fire commissioner or of any laws or ordinances which either the health or the fire department is

authorized, empowered and especially charged to enforce, where the amount of such penalty or fine shall not exceed five hundred dollars, must be brought in the district, in which such violation happened or occurred.

Notes to section 25.

This section is taken from section 1370 of the Charter (Laws 1897, chap. 378), as amended in 1901, which superseded section 1289 of the Consolidation Act (Laws 1882, chap. 410).

Actions by or against the city must be in the corporate name of "The City of New York." Charter, § 1614.

Association.— Under section 1289 of the Consolidation Act (Laws 1882, chap. 410), which is now this section, an action brought against an association in the name of its president must be brought in the district in which either the plaintiff or such president resides. *Brooks* v. *Dinsmore*, 15 Daly, 428.

Clerk.— A person permanently employed and regularly in attendance in a store in the city of New York is to be considered as having a "place of business" in that city, and may be sued by a long summons. *Lewis* v. *Davis*, 8 Daly, 185.

Corporation.— The plaintiff may bring his action either in the district in which he resides, or the defendant, being a corporation, in one in which it transacts its general business, or has an agency established for the transaction of business or keeps an office. The limit is not to a district in which the general business is transacted. It is enough that there is an agency for the transaction of business, or that the defendant keeps an office. *Jay* v. *Long Island R. R. Co.*, 2 Daly, 401.

The principal office of the plaintiff, a religious corporation, was its treasurer's office, and it transacted most of its business there. *Held*, that an action brought by it was properly brought in the district within which such office was situated although its church edifice was situated in a different judicial district. *St. Michael's Protestant Episcopal Church* v. *Behrens*, 13 Daly, 548; s. c., 10 Civ. Proc. Rep. 181.

Dismissal.— To authorize the dismissal of an action on the ground that it was brought in the wrong district, that fact must appear from the evidence. *Werner* v. *Braunstein et al.*, 20 Misc. Rep. 341.

Milk and cream cans.— In an action concerning this subject the complainant may elect the district within which he will commence, irrespective of the residence of the justice and the location of the subject-matter of the action. The Domestic Commerce Law (Laws 1896, chap. 376), § 29, as amended Laws 1900, chap. 545.

Nonresidents.— The Legislature had power to confer jurisdiction upon this court over nonresident defendants who have a place of business in the city of New York for the regular transaction of business. *Routenberg* v. *Schweitzer*, 165 N. Y. 175, revg. s. c., 50 App. Div. 218.

Though both plaintiff and defendant are nonresidents of this city, this court has jurisdiction. *Evans* v. *Wood*, 15 Abb. Pr. 416.

Id.; of districts.— Where it appears that both plaintiff and defendant reside in the city of New York, but neither within the district for which the court is held, it is the duty of the justice to dismiss the action. *Beatie* v. *Larkin*, 2 E. D. Smith, 244; *Bear* v. *Kempner*, 15 Daly, 110; s. c., 22 N. Y. St. Rep. 37; *Brooks* v. *Dinsmore*, 15 Daly, 428; s. c., 8 N. Y. Supp. 103.

Objection.— If the action is brought in the wrong district objection thereto must be taken at the trial, or it is waived. *Fairbanks* v. *Corlies*, 1 Abb. Pr. 454; s. c., 3 E. D. Smith, 582; *McKee* v. *Oliver*, 2 Daly, 381; *Dammann* v. *Peterson*, 17 Misc. Rep. 369.

An objection to the jurisdiction on the ground of nonresidence in the district may be taken on the second trial, where the fact then appears for the first time. *Brooks* v. *Dinsmore*, 15 Daly, 428. See also *Baer* v. *Kempner*, 22 N. Y. St. Rep. 37.

Place of business.— Nonresidents having a place of business in this city are to be deemed, for purposes of suing, residents of the districts in which their place of business is situated. *Clarkson* v. *Mittnacht*, 6 Daly, 398.

Proof.— Refusal of the court to transfer the action, without proof that it was brought in the wrong district, is correct. *Whitman & Barnes Mfg. Co.* v. *Hamilton*, 27 Misc. Rep. 198, 57 N. Y. Supp. 760.

Refusal to transfer action; mandamus.— An alleged wrongful refusal of a justice to order a removal of an action to another district of the court should be reviewed by appeal, and a writ of mandamus will not lie against the justice. Where however the justice refused to receive or file motion papers, for a rehearing of the motion, for a removal, which the defendant deemed essential to a proper review of the adverse decision, the court ordered a peremptory writ to issue compelling the justice to file the papers to the end that they might be made a part of the record. *People ex rel. Jaffe* v. *Bolte*, 35 Misc. Rep. 53.

Waiver.— Appearance by defendant and taking judgment by default against plaintiff in the district to which the issues have been sent to trial precludes him from objecting to the jurisdiction on the ground that it was in the wrong district. *Koerkle* v. *Pangburn*, 33 Misc. Rep. 476, 67 N. Y. Supp. 898; *Methen* v. *Eyelis*, 33 Misc. Rep. 98, 67 N. Y. Supp. 246, 8 N. Y. Annot. Cas. 372; *Barker* v. *Areher*, 49 App. Div. 80, 63 N. Y. Supp. 298.

§ 26. **Action; how commenced.**— An action brought in the municipal court of the city of New York, must be commenced by the service of a summons, or the voluntary appearance of and joinder of issues by the parties.

Notes to section 26.

This section is substantially the same as section 1296 of the Consolidation Act (Laws 1882, chap. 410).

Deemed commenced.— An action is deemed commenced when the summons is delivered to the proper officer for service, and this saves the statute of limitations. See § 30, *post*, and §§ 398 and 400, Code Civ. Proc.

Discontinuance.— Action can be discontinued, before finally submitted. *Rothenberg* v. *Filarsky*, 30 Misc. Rep. 610.

Fictitious name; appearance.— The summons issued was not in the proper name of the defendant, nor stated that the name was a fictitious one: defendant did not appear personally, but his wife, an ignorant foreigner, was present on the return day, apparently to explain that he was ill, as in fact he was. *Held*, that she could not be regarded as his agent under section 1294 of the Consolidation Act, and an amendment of the summons was irregular, and did not justify entry of a judgment by default against defendant in his proper name. *Stromberg* v. *Carnese*, 35 Misc. Rep. 289, 71 N. Y. Supp. 746.

Name of another.— If a person, vexatiously or maliciously, in the name of another, but without the latter's consent, or in the name of an unknown person, commences or continues, or causes to be commenced or continued, an action or special proceeding, in a court, of record *or not of record*, or a special proceeding before a judge or a justice of the peace; or takes, or causes to be taken, any proceeding, in the course of an action, or special proceeding, in such a court, or before such an officer, either before or after judgment or other final determination; an action, to recover damages therefor, may be maintained against him, by the adverse party to the action or special proceeding; and a like action may be maintained by the person, if any, whose name was thus used. He is also guilty of a misdemeanor, punishable by imprisonment, not exceeding six months. Code Civ. Proc., § 1900.

In an action, brought by the adverse party, as prescribed in the last section, the plaintiff, if he recovers final judgment, is entitled to recover treble damages. In an action, brought by the person whose name was used, as prescribed in the last section, the plaintiff is entitled to recover his actual damages, and $250 in addition thereto. Code Civ. Proc., § 1901.

Poor person.— As to who may prosecute, and the manner and mode of so doing, see §§ 45 to 53, inclusive.

Revivor.— By section 20 the provisions of the Code of Civil Procedure shall apply to this court as far as the same can be made applicable and are not in conflict with the provisions of this act. The power of a court of record to revive an action, in case of the death of a sole plaintiff, or a sole defendant, if the cause of action survives or continues, is

conferred by section 757 of the Code of Civil Procedure. This section however is only applicable to the Supreme Court, the City Court of the city of New York, and the County Court (Code Civ. Proc., § 3347, subds. 4 to 6), and heretofore has not been made applicable to this court. We think that section 20 gives the same power to this court, inasmuch as section 757 can be made applicable to this court, and is not in conflict with any of the provisions of this act.

Statute of limitations.— As to the time when actions must be brought, see §§ 376 to 415, inclusive, Code Civ. Proc.

§ 27. **Summons; requisites.**— The summons must be addressed to the defendant by name, or if his name be unknown, by a fictitious name, and must summon him to appear before the court, at the court-room thereof, and at the time specified therein, to answer the complaint of the plaintiff, and must state the amount for which the plaintiff will take judgment if the defendant fail to appear and answer; it must be issued and subscribed by the clerk of the court in the district out of which the same is issued, or by his assistant in the name of such clerk, except as provided in section twenty-five of this act.

Notes to section 27.

This section is taken from section 1297 of the Consolidation Act (Laws 1882, chap. 410), part of which has been embodied in section 29.

It will be observed that the summons to "appear before *the justice in* the court," as was contained in section 1297 of the Consolidation Act (Laws 1882, chap. 410) has been omitted, and that now the defendant is summoned to appear "*before the court*" and not before the "justice."

Amendment.— The summons may, on the trial, be amended so as to change the nature of the right in which the plaintiff sues, *e. g.*, it may be amended so as to make it a suit by him in his own right instead of "as" assignee. *Martin et al.* v. *Johnson et al.*, 8 Daly, 541. See also *Boyd* v. *Vanderkamp*, 1 Barb. Ch. 274; *City of New York* v. *Union Ry. Co.*, 31 Misc. Rep. 451, 64 N. Y. Supp. 483.

Where a summons of the Municipal Court of the city of New York is not in the proper name of the defendant, and contains no statement that the name by which he is designated is fictitious, and he does not appear on the return day either in person or by an agent or by an attorney, the court has no power then to amend the summons to the proper name of the defendant and render judgment against him by that name. *Stromberg* v. *Carnese*, 35 Misc. Rep. 289.

Error, if any, in the amendment of a summons by adding new parties-defendant is available only to the original defendant. *Hutton* v. *Murphy*, 9 Misc. Rep. 151. See also *Stromberg* v. *Carnesc*, 35 Misc. Rep. 289, 71 N. Y. Supp. 746.

Justice has no power to allow an amendment of summons on trial by adding the amount named in the summons to another action between the same parties. *Balch* v. *Wurzburger*, 9 Misc. Rep. 74.

Amendment of the summons upon plaintiff's withdrawing the action at the trial, on discovering that the party to be held liable had not been served, and that the defendant designated was not the party for whom the services sued for were rendered, so as to bring in new defendant for the one then in court.— *Held* unauthorized. *Elias* v. *Hayes*, 24 Misc. Rep. 754, 53 N. Y. Supp. 858.

Appearance; objections to service of summons.— General appearance is a waiver of objections to service of summons. *Abramson* v. *Koch*, 27 N. Y. Supp. 310.

Fictitious name.— Ignorance of the name should be made to appear in the summons to justify the use of a fictitious name. *Fisher* v. *Hetherington*, 11 Misc. Rep. 575.

Id.; change of.— Plaintiff in the summons designated defendant as *Joseph* Litto, stating therein that the first name was fictitious, the real name being unknown to plaintiff, and obtained judgment by default in the action, issued execution, and arrested *Frank* Liatto. *Held*, that the arrest was unauthorized under such judgment, and that plaintiff was bound by his position that the Christian name only was unknown to him. *People ex rel. Liatto* v. *Dunn*, 27 Misc. Rep. 71, 58 N. Y. Supp. 147.

Id.; want of.— Where a summons is not in the proper name of the defendant and contains no statement that the name by which he is designated is fictitious, and he does not appear on the return day either in person or by an agent or by an attorney, the court has no power then to amend the summons to the proper name of the defendant and render judgment against him by that name. *Stromberg* v. *Carnesc*, 35 Misc. Rep. 289, 71 N. Y. Supp. 746.

Id.; inserting of real name.— Whenever the name of a defendant sued by a fictitious name becomes known, it should be substituted, and the proceeding be amended in that respect. Thus, where the defendant appeared, disclosed his name, and defended the action, a judgment against "John Doe," as named in the process, was set aside and declared erroneous. The defendant so appearing and defending the suit has a right to appeal in his true name, although the judgment be not nominally against him. *McCabe* v. *Sands*, 2 E. D. Smith, 64; *Heidenheimer* v. *Lyon and Bush sued as John* Doe, 3 E. D. Smith, 54; *Hoffman* v. *Fish*, 18 Abb. 76.

Id.; judgment; amendment.— Judgment against a defendant by a fictitious name shall not bind or be a charge upon the real property

or chattels real of any person, and may be amended at any time within ten years after the docketing thereof by inserting the true name of such judgment debtor upon such notice to him as the court may direct, and such judgment shall thereafter be a lien upon the real property and chattels real which the judgment debtor then had, or may thereafter acquire, but not for a longer period than ten years after the original docketing of such judgment. § 1251, Code Civ. Proc., as amended by Laws 1902, chap. 318.

Mistake in name.— This court has power to correct a mistake in the name of the defendant; which is waived, if not pleaded. *City of New York* v. *Union Ry. Co.*, 31 Misc. Rep. 451, 64 N. Y. Supp. 483.

A person who claims that a summons, in which his brother is named as the defendant, was served upon him by mistake, has two available remedies: one to move to set aside the service, and the other to serve a notice of appearance indicating that the summons was served on the wrong individual, and if no attention is paid to this to formally answer and bring the case to trial and procure the complaint to be dismissed with costs. If he resorts to the first-mentioned remedy, and the plaintiff opposes the motion, claiming that the person served was the defendant desired, it is the duty of the court to deny the motion. *Lederer Amusement Co.* v. *Pollard*, 71 Misc. Rep. 35.

Single letter.— The law does not recognize a single letter as a name. *Frank* v. *Levil*, 5 Robt. 599; *Curtis* v. *Brooks*, 37 Barb. 479.

Unknown name.— Designating a defendant by a fictitious name can only be done where the plaintiff is ignorant of the true name. *Crandal* v. *Beach*, 7 How. Pr. 271. See also *Eliot* v. *Hart*, 7 How. Pr. 25. In a case where the name of the defendant was unknown, and he was described as "John Doe, the real defendant in this suit, whose name is not now known to this deponent, was in command of the sloop Hornet, of Troy." it was held to be a sufficient description. *Pindar* v. *Black*, 4 How. Pr. 95; s. c., 2 Code Rep. 53.

Striking out name.— If too many persons are joined as defendants the names of those improperly joined may, under section 173 (now § 723) of the Code of Civil Procedure, be stricken out and judgment entered against the others.

The cases of *Gates* v. *Ward*, 17 Barb. 424; *Webster* v. *Hopkins*, 11 How. Pr. 140; *Ackley* v. *Turbox*, 29 Barb. 512, and *Gilmore* v. *Jacobs*, 48 Barb. 336, holding that section 173 (now § 723) of the Code of Civil Procedure does not apply to justices' courts, overruled. *Lowe* v. *Rommel*, 5 Daly, 17.

§ 28. **Form of summons.**— The summons must be substantially in the following form, the blanks being properly filled out.

MUNICIPAL COURT OF THE CITY OF NEW YORK.

Borough of , district

..... plaintiff, against ..... defendant.	Summons.

To the above named defendant:

You are hereby summoned and required to appear in this action in the municipal court of the city of New York, borough of ....., ... district, in the court room thereof, at ....., in the city of New York, on the ..... day of ....., 19.., at ..... o'clock in the forenoon, to answer the complaint of the plaintiff in this action, who, if you then fail to appear and answer will take judgment against you for the sum of ..... dollars, with interest from the ..... day of ....., 19.., together with the costs of this action.

Dated, New York, ..., 19...

....., Clerk.

Notes to section 28.

This section is new.

There is only one form of summons in this court, the provision for the short summons contained in section 1298 of the Consolidation Act (Laws 1882, chap. 410) having been repealed, thus doing away with the provision relating to nonresidents, a subject which has caused many conflicting decisions in the courts.

For return day in the summons, see § 37.

§ 29. **Summons; corporation counsel may issue, et cetera.**— In any and all actions brought in the name of the city of New York, or of any department, board, or officer thereof,

by the corporation counsel of the city of New York, as attorney for said city, or said department, board or officer thereof, to recover a penalty or penalties for the violation of any laws or ordinance, the summons may be issued out of said court by the corporation counsel in his own name without the same being subscribed by the clerk of the court where such action or actions are brought, and in such actions the corporation counsel shall not be required to pay to the clerk of the court the fees in the action, but shall account therefor to the city treasury and shall collect the same from the defendant, when judgment is recovered; and no fees or costs shall be demanded of the said the city of New York or any board or officer thereof in any such suit or proceeding.

Notes to section 29.

This section is a part of section 1297 of the Consolidation Act (Laws 1882, chap. 410), which was headed "The Summons," and contained as one section what is now contained in section 27 and this section, the present section being substantially the latter half of section 1297 of the Consolidation Act (Laws 1882, chap. 410). See notes to § 27.

Corporation counsel; bureau for recovery of penalties established by section 259 of the Charter. By section 1614 of the Charter the corporation counsel shall assume the charge, direction and control of all such actions, suits and proceedings in behalf of the city of New York.

As to fees or other compensation to persons who serve process for the corporation counsel, see § 302.

§ 30. **Service; alias.**— An action shall be deemed commenced, at the time the summons is actually delivered for service. If the marshal or other person having the summons to serve, cannot find the defendant so as to serve him therewith as required by this act, he must so return, and the clerk shall, at the request of the plaintiff, if made between the last day when service could be had and the return day mentioned in said summons or alias, including such return day, continue from time to time to issue another summons, to be known as and stamped "alias," until the defendant is served.

Notes to section 30.

This section is taken from the latter portion of section 1303 of the Consolidation Act (Laws 1882, chap. 410), which was formerly taken from Laws 1857, chap. 344, § 22.

As to when action shall be deemed commenced, see notes under § 26, and § 400, Code Civ. Proc.

It must be observed that the alias summons must be *stamped* "alias," so that a writing on the face of the summons, or an indorsement thereon "alias," would be held not a compliance with this section.

Alias summons may issue, without charge, on application to the clerk at the time of the return mentioned therein, when the summons is not served. Before an alias summons can issue, the original summons must have the indorsement of the marshal that the defendant cannot be found. *Doughty* v. *Hess*, opinion by Gedney, J., January 9, 1878, Daily Register, January 26, 1878, vol. 13, No. 22.

If the marshal returns a summons "Defendant not found," the plaintiff, on demand, is entitled to an alias summons, without waiting until the return day named in the summons. *Ellinghausen* v. *Leask*, 1 Abb. N. C. 299.

Clerk has no power to issue a second or "alias" summons, unless proof has been made by the marshal, or other person having the first summons to serve, of his inability to find the defendant. *Loeb* v. *Smith*, 24 Misc. Rep. 200, 52 N. Y. Supp. 677.

"New summons;" in action upon bastardy bonds for any breaches of the condition of such bond which shall happen after the recovery of any damages, on the commencement of any suit, the court in which the suit was originally brought shall have power to issue a new summons, and upon the return thereof to ascertain the amount of damages arising from such breach, and to give judgment accordingly. § 178.

Other defendants.— An alias summons cannot be issued to bring in other defendants, the action failing against the only defendant made a party. *Elias* v. *Hayes*, 24 Misc. Rep. 754, 53 N. Y. Supp. 858.

§ 31. **Method of service.**— The summons must be served as follows:

1. If an action be against a corporation, by delivery of a copy to the president or other head of the corporation, or to the secretary, cashier, or managing agent thereof, but when no such officer resides in the city, to a director resident therein.

2. If against a minor under the age of fourteen years, by delivery of a copy to such minor, and also to his father,

mother or guardian, or if they be not within the city, then to any person having the care or control of said minor, or with whom he resides, or in whose service he is.

3. If against a person judicially declared to be of unsound mind, or incapable of conducting his own affairs in consequence of habitual drunkenness, or for any other cause, and for whom a committee has been appointed, by delivery of a copy to such committee and of the defendant personally.

4. In all other cases to the defendant personally, except as in this act otherwise specially provided.

Notes to section 31.

This section is the same as section 1300 of the Consolidation Act (Laws 1882, chap. 410), which was a part of section 14, Laws 1857, chap. 344, except the substitution of the word "or" for "but" in the third line of subdivision 1.

Appearance, general, for defendant by an attorney confers jurisdiction although he was retained to appear only specially to have service of the summons set aside, if he had authority to appear at all. *Kramer* v. *Gerlach*, 28 Misc. Rep. 525, 59 N. Y. Supp. 855.

Attorney.— Service of summons and complaint *on defendant's attorney*, not followed by appearance on the return day, gives no jurisdiction, and a judgment entered thereon as by default is void. *Goldberg* v. *Fowler*, 29 Misc. Rep. 328.

Corporations.— To authorize legal service upon a managing agent, he must be one whose agency extends to all the business of the corporation, and not a particular branch or department of its business. *Brewster* v. *Michigan Central R. R. Co.*, 5 How. Pr. 183. A baggage-master is not such an agent as the statute contemplates. *Flynn* v. *Hudson River R. R. Co.*, 6 How. Pr. 308. An agent of an insurance company, properly appointed and qualified to procure and effect insurance, residing at a different place from where the principal office of the company is located, is such a "managing agent" that legal service against the company may be made by serving him. *Bain* v. *Globe Ins. Co.*, 9 How. Pr. 448. Where it is uncertain whether the party served is or is not a managing agent, the burden is on the defendant to show the relation to them of a party served, and that he is not a managing agent, it being within their power to show the precise relations of the agent toward them. *Donadi* v. *N. Y. State Mut. Ins. Co.*, 2 E. D. Smith, 519.

Personal service upon a managing agent of a corporation is personal service upon the corporation, and if the marshal's return shows such a service the jurisdiction of the justice is established, and his judg-

ment will be regular upon its face. *N. Y. & Erie R. R. Co.* v. *Purdy*, 18 Barb. 574.

For further and other cases of service on agents and officers of corporations, see Cumming & Gilbert's Official Court Rules, 1900, pp. 74 to 79.

Defects in the affidavit of service may be amended on the return day, and are cured by appearance or answer without objection. *Cushingham* v. *Phillips*, 1 E. D. Smith, 416; *Andrews* v. *Throop*, 1 E. D. Smith, 615; *Bray* v. *Andreas*, 1 E. D. Smith, 387; *Hogan* v. *Baker*, 2 E. D. Smith, 22; *Boyd* v. *Vanderkemp*, 1 Barb. Ch. 274. See also 1 Hilt. 49; 32 How. 230; 3 E. D. Smith, 119, 303, 577; 1 Daly, 306.

Designated service.— Section 430, Code Civ. Proc., entitled "Designation by a resident of a person upon whom to serve a summons during his absence, effect and revocation thereof," is made applicable by section 74 of this act, *post*, with reference to what may be shown for procuring a warrant of attachment.

Election day.— Service of a summons on an elector on an election day, and all proceedings under it, are void. *Meeks* v. *Noxon*, 1 Abb. Pr. 280; s. c., *sub nom. Meeks* v. *Noxon*, 11 How. Pr. 189; *Hastings* v. *Farmer*, 4 N. Y. 296; *Bierce* v. *Smith*, 2 Abb. Pr. 411. See also *People ex rel. Monday* v. *Schwartz*, 3 Abb. Pr. N. S. 395.

Fraud.— Any attempt by fraud or misrepresentation to induce or bring a party within the jurisdiction for service of process upon him, will make the service irregular and null and void. *Carpenter* v. *Simonson*, 2 Code Rep. 140; s. c., 2 Sandf. 717; *Goupil* v. *Simonson*, 3 Abb. Pr. 474.

Where there has been any fraud, trick, deceit or misrepresentation, for the purpose of bringing a person within the jurisdiction, that he may be served with summons, the service will be set aside. *Baker* v. *Wales*, 45 How. 137, 14 Abb. N. S. 231; *Carpenter* v. *Spooner*, 2 Code Rep. 140; affd., 2 Sandf. 716, 3 Code Rep. 23; *Metcalf* v. *Clark*, 41 Barb. 45. And see *Goupil* v. *Simonson*, 3 Abb. 474.

When attorney's clerk enticed defendant within the jurisdiction, the summons was set aside. *Wyckoff* v. *Packard*, 20 Abb. N. C. 420.

When a defendant is induced to come within the jurisdiction of a court by letter from the plaintiff requesting an interview, and is then served at the office of plaintiff with a summons,— *Held*, that the service should be set aside. *Dunham* v. *Cressy*, 21 N. Y. St. Rep. 266, 4 N. Y. Supp. 13.

Any trick or device which deprives a defendant of fair notice that an action has been commenced is a fraud. Putting defendant in the unknown possession of a summons, disguised so as to conceal from him its nature, just as he is entering upon a sea voyage, is not good service; nor does the subsequent discovery by defendant of the contents when he is beyond the limits of the State make it good. *Bulkley* v. *Bulkley*, 6 Abb. 307.

Service by wrongful entrance to house. *Mason* v. *Libbey*, 1 Abb. N. C. 354.

When judgment set aside as having been procured through fraud in the service. *Mather* v. *Parsons*, 32 Hun, 338.

Fact of service; jurisdiction.— While the return of personal service of the summons on defendants establishes jurisdiction *prima facie*, yet if the summons was not in fact served, no jurisdiction was acquired. *Iron Clad Mfg. Co.* v. *Benjamin E. Smith & Sons*, 28 Misc. Rep. 172, 59 N. Y. Supp. 332. See also § 253, "Court May Open Default," and § 311, as to appeal in such case after notice of entry of judgment.

Holidays.— See notes to §§ 17 and 37. Service of process is not invalid because made on a holiday. Laws 1881, chap. 30, designating the holidays to be observed in the presentation and acceptance of bills of exchange, notes, and checks, and the closing of public offices was not intended to diminish the number of judicial holidays. *Didsbury* v. *Van Tassell*, 31 N. Y. St. Rep. 204; s. c., 56 Hun, 423.

Christmas day and Lincoln's birthday.— There is no law in this State interdicting the service of any legal process or the holding of any court on a holiday, and so service of a summons on a Christmas day is legal. *Didsbury* v. *Van Tassell*, 56 Hun, 423.

Service of an order upon Lincoln's birthday is valid. *Matter of Borneman*, 6 App. Div. 524.

Service of summons is good on a legal holiday. *Walton* v. *Stafford*, 162 N. Y. 558; *Paige* v. *Shainwald*, 169 N. Y. 246; *Flynn* v. *Surety Co.*, 170 N. Y. 145, affg. s. c., 61 App. Div. 170.

Service of process is not invalid because made on Saturday half-holiday. *Didsbury* v. *Van Tassell*, 56 Hun, 423.

Where the time within which a party may serve a pleading falls upon a Saturday, that day, being a half-holiday, must be excluded in computing the time, and the service upon the following Monday is sufficient. *Reynolds* v. *Palen*, 13 Civ. Proc. Rep. 200. But see *contra*, *Fries* v. *Coar*, 13 Civ. Proc. Rep. 152. And see *Nichols* v. *Kelsey*, 13 Civ. Proc. Rep. 154.

Lunatic.— An action cannot be brought against a lunatic judicially declared such, without application to the court. The summons must then be served upon his committee and upon the lunatic personally. Code, §§ 426, 431, 432; *Sovereill* v. *Dickson*, 5 How. Pr. 109.

Marshal cannot serve a summons in his own action, where he is the plaintiff. *Smith* v. *Burlis*, 23 Misc. Rep. 544.

Id.; return not conclusive.— Defendant may object that the summons was not served in such a manner as to confer jurisdiction. *Wheeler* v. *N. Y. & Harlem R. R. Co.*, 24 Barb. 414.

Mechanic's liens.— Service of summons must be made at least eight days before the return day. Code Civ. Proc., § 3404, which was added

by Laws 1897, chap. 419, p. 547. See § 3405 of said Code, for service of summons by publication.

Modes of serving summons.— See notes on same in 21 Abb. N. C. 178.

Objections to service must be made by appearing specially for that purpose only; a general appearance waives the objection. The defect may be amended. See authorities cited to "Defect" in notes to this section above, and notes to § 37.

Plaintiff cannot serve summons in his own case (§ 36; Code Civ. Proc., § 425), but if he does, it is a mere irregularity, and the summons is not void. *Hunter* v. *Lester*, 18 How. Pr. 347; s. c., 10 Abb. 260; *Losey* v. *Stanley*, 83 Hun, 420.

Return of personal service.— To authorize a justice to render judgment against an absent defendant there must be a return showing personal service of summons. *Manning* v. *Johnson*, 8 Barb. 457.

Substituted service when a defendant cannot be found is now provided for by sections 32, 33, 34.

Summons not personally served, and defendant not appearing, he is allowed to appeal within twenty days after personal service upon him of written notice of entry of judgment. See § 311. And by section 253 the "court may open default."

Sunday.— Process cannot be served on Sunday. Code Civ. Proc., § 69; *Van Vechten* v. *Paddock*, 12 Johns. 178; *Scott Shoe Co.* v. *Dancel*, 63 App. Div. 172.

Service of notice of a motion on Sunday is irregular and void. *Field* v. *Park*, 20 Johns. 140. Proceedings founded upon the service of a writ on Sunday vacated. *Rob* v. *Moffat*, 3 Johns. 257.

Witness, nonresident.— A resident of another State coming to the city to be examined as a witness, and attending in good faith for that purpose only, is exempt from the service of a summons upon him. *Seaver* v. *Robinson*, 3 Duer, 622; *Person* v. *Grier*, 66 N. Y. 124; *Brett* v. *Brown*, 13 Abb. Pr. N. S. 295.

§ 32. **Order for service of summons; when defendant not found.**— An order for the service of a summons upon a defendant residing within the city, may be made by the court in the district in which an action is brought after an alias summons has been duly issued, upon satisfactory proof by the affidavit of a person not a party to the action, and the return of a marshal, that proper and diligent effort has been made to serve the summons upon the defendant, and that the place of his sojourn cannot be found, or if he is within the city that he avoids service so that personal service could not be made.

Notes to section 32.

This section and sections 33, 34 and 35 are taken from Article II, "Substitutes for Personal Service in Special Cases," §§ 435 to 445, Code Civ. Proc. By Laws 1853, chap. 511, and Laws 1863, chap. 212, the District Courts possessed the power of "substituted service;" these laws were repealed by the "Repealing Act" (Laws 1880, chap. 245), since which time this court has been without the power now restored.

Affidavit to obtain order.— Where it is shown by affidavit that the defendant cannot, after diligent effort, be served at his place of business or residence, and that no information can be obtained as to his whereabouts, an order for substituted service may properly be granted. *Malloy* v. *Lennon*, 22 Misc. Rep. 542, 49 N. Y. Supp. (83 St. Rep.) 1004, 27 Civ. Proc. Rep. 166. See also *Nagle* v. *Taggart*, 4 Abb. N. C. 144; *Easton* v. *Malawazi*, 7 Daly, 147; *Simpson* v. *Burch*, 4 Hun, 315.

Amendment; error in name.— An error in the given name of the plaintiff in the copy of a summons annexed to an order for substituted service may be corrected on motion; it does not require that the summons and the order for the substituted service thereof and such service be set aside. *Farrington* v. *Muchmore*, 52 App. Div. 247, 65 N. Y. Supp. (99 St. Rep.) 432, revg. 30 Misc. Rep. 218, 62 N. Y. Supp. (96 St. Rep.) 165.

Infants.— Substituted service upon "any defendant" includes infants. *Steinhardt* v. *Baker*, 25 App. Div. 197; affd., 163 N. Y. 410, 49 N. Y. Supp. (83 St. Rep.) 357.

Substituted service may be made upon infants who are concealed from service by their mother. *Steinhardt* v. *Baker*, 25 App. Div. 197; affd., 163 N. Y. 410, 49 N. Y. Supp. (83 St. Rep.) 357.

Irregularity; misnomer.— Misnomer of the plaintiff, in a summons, is a substantial irregularity, for which a substituted service will be set aside. *Farrington* v. *Muchmore*, 30 Misc. Rep. 218, 62 N. Y. Supp. (96 St. Rep.) 165.

Mechanic's lien actions; when personal service cannot be made.— If personal service of the summons cannot be made upon a defendant in an action *in a court not of record*, by reason of his absence from the State, or his concealment therein, such service may be made by leaving a copy thereof at his last place of residence, and by publishing a copy of the summons once in each of three successive weeks in a newspaper in the city or county where the property is situated. Code Civ. Proc., § 3405.

Order for service on infants.— An order for substituted service upon infants is sufficient, although it does not, in express terms, require service upon the parent, where it follows the statute literally, and it appears that service was made on the mother as the parent and person with whom the infants resided. *Steinhardt* v. *Baker*, 163 N. Y. 410, 57 N. E. 629.

§ 33. **How such service must be made.**— The order must direct that the service of the summons be made, by leaving a copy thereof, and of the order, at the residence of the defendant, with a person of proper age, if upon reasonable application, admittance can be obtained, and such person found who will receive it; or, if admittance cannot be obtained, nor such a person found, by affixing the same to the outer or other door of the defendant's residence, and by depositing another copy thereof, properly enclosed in a post-paid wrapper, addressed to him, at his place of residence, in a post-office in the borough in which he resides; or upon proof being made by affidavit that no such residence can be found, service of the summons may be made in such manner as the court may direct.

Notes to section 33.

This section is taken from section 436 of the Code of Civil Procedure. See notes to § 32.

Holiday.— Service of summons may be made on a, *Didsbury* v. *Van Tassel*, 56 Hun, 423; *People* v. *Van Tassel*, 50 Hun, 105.

Summons not personally served, defendant not appearing, the remedy is by appeal from the judgment. See § 311 and notes.

§ 34. **Papers to be filed; proof of service.**— The order, and the papers upon which it was granted, must be filed, and the service must be made, not less than six days before the return day of the summons; otherwise the order becomes inoperative. On filing an affidavit showing service according to the order, the summons is deemed served and the same proceedings may be taken thereupon, as if personal service thereof had been made except that no execution against the person shall issue upon a judgment obtained after such service.

Notes to section 34.

This section is taken from section 437 of the Code of Civil Procedure. See also notes to § 32.

Proof of service.— Substituted service by leaving the copy of summons at what was assumed to be the defendant's residence, but which in fact was not, the defendant having left the State, is insufficient to confer jurisdiction. *Matter of Norton*, 32 Misc. Rep. 224, 66 N. Y. Supp. (100 St. Rep.) 317.

The affidavit must be filed showing service according to the order. The same kinds of proof are necessary in cases of substituted service as when the service is by publication. *Smith* v. *Fogarty*, 6 Civ. Proc. Rep. 366.

§ 35. **Defendant when allowed to defend.**—Where the summons is served, pursuant to an order made as herein prescribed, and the defendant so served does not appear, he or his representative must upon good cause shown and upon just terms be allowed to defend the action at any time within six months after personal service of written notice thereof; or if such notice has not been served, within two years after the entry of the judgment. If the defense is successful, and the judgment, or any part thereof has been collected or otherwise enforced, such restitution may thereupon be compelled as the court directs, but the title to property sold, to a purchaser in good faith by virtue of an execution issued upon the judgment, shall not be affected thereby.

Notes to section 35.

This section is taken from section 445 of the Code of Civil Procedure, the time limits being lessened. See also notes to § 32.

Terms to be imposed.—See *Marvin* v. *Brandy*, 30 N. Y. St. Rep. 694, 9 N. Y. Supp. 593.

§ 36. **Who may serve summons, et cetera.**— The summons, and in a proper case a copy of the complaint, or a precept in summary proceedings, may be served by a marshal or by any person not a party to the action, who is over the age of eighteen years. Proof of service by such person other than a marshal must be made by his affidavit which must state the particular place, time and manner of service, and that the affiant knew the person so served to be the person mentioned and described in the summons as defendant therein.

Notes to section 36.

This section is substantially the same as section 1301 of the Consolidation Act (Laws 1882, chap. 410), and of section 3208 of the Code of Civil Procedure, relating to inferior city courts, the latter of which was a substitute for section 15 of the Laws of 1857, chap. 344.

See also § 425, Code Civ. Proc., as to who may serve the summons, and § 302 of this act, "Process to be Served by Marshals."

As to the method of service, see § 31 and notes.

As to substituted service, and proof of service, see § 34.

This section should also be entitled "Proof of Service," as the latter half of it relates to that subject.

Admission of service.— Plaintiff is not made incompetent to prove admission of service. *White* v. *Bogert*, 73 N. Y. 256; *Maples* v. *Mackey*, 15 Hun, 533.

Affidavit of service; Supreme Court rule.— Where personal service of the summons, and of the complaint, or notice, if any accompany the same, shall be made by any other person than the sheriff (marshal), it shall be necessary for such person to state in his affidavit of service his age, or that he is more than twenty-one years of age; when, and at what particular place, and in what manner he served the same, and that he knew the person served to be the person mentioned and described in the summons as defendant therein; and also to state in his affidavit that he left with defendant such copy, as well as delivered it to him. No such service shall be made by any person who is less than eighteen years of age. Rule 18 of the Supreme Court, made applicable by section 20.

Amendment of affidavit of service may be made even after judgment. *Jones* v. *U. S. Slate Co.*, 16 How. Pr. 120.

Attorney may serve the summons, and the court will take judicial notice that he is at least twenty-one years of age, when his age is omitted from the affidavit. *Booth* v. *Kingsland, etc.*, 18 App. Div. 407. See also *Spaulding* v. *Lyon*, 2 Abb. N. C. 203.

Copy served; proof of service of a summons in an action to recover a penalty, the original being properly indorsed, is, *it seems*, not proof that the summons served was so indorsed. *People* v. *Walters*, 7 Civ. Proc. Rep. 406; s. c., 15 Abb. N. C. 461.

Disputing the fact of service before judgment.— The defendant may dispute the service before appearing in the action. *Litchfield* v. *Burwell*, 5 How. Pr. 341, 1 Code R. N. S. 42; *Van Rensselaer* v. *Chadwick*, 7 How. 297; *Wheeler* v. *N. Y. & H. R. R. Co.*, 24 Barb. 44.

If it appears that he purposely kept out of the way to avoid personal service, he must satisfy the court that the summons did not in fact reach him or come to his knowledge. *Southwell* v. *Marryatt*, 1 Abb. Pr. 218; *Hilton* v. *Thurtson*, 1 Abb. Pr. 318.

Where, from the affidavit of the defendant, his son and his attorney, it appears that the summons was never served upon the defendant, but left at his place of business during his absence, and against this is the customary unsworn indorsement of the marshal that the summons had been personally served upon the defendant, the presumption of regularity is rebutted by the defendant, and in absence of an affi-

davit by the marshal a retrial of the cause should be granted. *Burkhard* v. *Smith*, 19 Misc. Rep. 31.

To make competent proof of the service of a summons, the affidavit of the person who made the service is not necessary; the affidavit of a third person, who swears unequivocally and positively to the service, is sufficient. The presumption from such an affidavit is that the affiant swears from personal knowledge, not from hearsay. *Murphy* v. *Shea*, 143 N. Y. 78.

Where a person testified that he served a summons, his testimony is of greater weight than is the testimony of disinterested persons who state that they stood by and saw no service made. *Szerlip* v. *Baier*, 21 Misc. Rep. 331.

Disputing the fact of service after judgment entered.— Under the law, as it existed, by the Charter of 1897, as amended in 1901, great difficulty was experienced to solve the question as to how to get rid of a judgment entered against a defendant who claimed that he had never been served with the summons. The judgment was not entered by default, which a justice could open, as by the decision in *Carpenter* v. *Willett*, 18 N. Y. 90, he was *functus officio*. After he had rendered judgment there was no remedy except by appeal from the judgment in pursuance of section 3057 of the Code of Civil Procedure, entitled "Proceedings when error of fact is alleged," which was made applicable to this court by section 1367 of said Charter, entitled "Appeals." In the case of *Edel* v. *McCone*, 16 Daly, 216, upon a motion by defendant to set aside a judgment on the ground that he had not been served with the summons, the plaintiff objected that the court had no jurisdiction under section 1367 of the Consolidation Act, entitled "Opening defaults and setting aside judgments." but the plaintiff was held to be estopped from making such objection because he had given proof of personal service on which judgment was entered.

In *Tracy* v. *Shannon*, 22 Abb. N. C. 136, the court struggled with the question and said the remedy was by appeal upon the alleged error of fact (§ 3057), or if the time to appeal had elapsed before the defendant was aware of the judgment, his remedy was in equity.

In *Iron Clad Mfg. Co.* v. *Benjamin E. Smith & Sons*, 28 Misc. Rep. 172, 54 N. Y. Supp. 332, it was held, under section 3057 of the Code and section 1367 of the Charter, that the return of personal service of the summons on defendant establishes jurisdiction *prima facie*, yet if the summons was not in fact served, no jurisdiction is acquired.

This troublesome question, and procedure as indicated, has now been set at rest by the repeal of section 1367 of the Charter, and a revision of the sections of the Code of Civil Procedure, which had been made applicable to this court by it, omitting, among others, section 3057 of the Code of Civil Procedure, leaving it now only applicable, as it originally was, to justices' courts in the country, and

by section 1, subdivision 19, of this act, giving this court jurisdiction, generally, to set aside any judgment upon any ground. See also "Summons Not Personally Served." And defendant not appearing, the remedy is by appeal from the judgment and not by motion to open default, for there is no default. See § 311 and notes.

Insufficient returns.— The following have been held to be insufficient: "Omitting title of cause." *Litchfield* v. *Burwell*, 5 How. 341. "Served copy left the 9th day of February, 1869." *Sperry* v. *Reynolds*, 65 N. Y. 179.

Marshal cannot serve summons in an action in which he is the plaintiff. *Smith* v. *Burlis*, 23 Misc. Rep. 544.

No fee allowed to person serving summons other than a marshal.— See § 302.

Objection.— The defendant must appear and make his objection to the return or service. *Hawley* v. *Wilson*, 1 Hilt. 259.

Plaintiff serving the summons is a mere irregularity, and the process is not void. *Hunter* v. *Lester*, 18 How. Pr. 347; s. c., 10 Abb. 260; *Losey* v. *Stanley*, 83 Hun, 420.

Policeman may serve all process and papers and have the powers of a marshal in action by the health department. Charter § 1262.

Sufficient return.—"Personally served, and by copy on E. L. W., a managing editor of defendants," it was held sufficient to give jurisdiction of the corporation, that the justice was not bound to require further evidence of the official position or character of the agent on whom the process was served. *N. Y. & Erie R. R. Co.* v. *Purdy*, 18 Barb. 574.

Summary proceedings.— The service of a precept in summary proceedings, latter part of, provided for in section 302 of this act.

§ 37. **Return day.**— The return day mentioned in the summons must not be more than twelve days from its date and except in the case where an order of arrest had been issued, must be served at least six days before the time of appearance.

Notes to section 37.

This section is part of section 1298 of the Consolidation Act (Laws 1882, chap. 410), with the "Short summons," or nonresident provision, omitted.

As to "order of arrest" provisions, see § 56. As to other or alias summons, see § 30. As to service of summons on legal holidays, Saturday and Sunday, see § 31 and notes.

Amendment.— In general the court will permit defective process to be amended, in order to promote the purposes of justice. *Boyd* v. *Vandenkemp*, 1 Barb. Ch. 274.

The general subject of amending process at common law and under the statute discussed. *Leetch* v. *Atlantic Mut. Ins. Co.*, 4 Daly, 518.

Computation of time.— In computing time, the day of the service is excluded, and the return day is included (Code, § 788), so that a summons, dated on the 1st, must not be returnable later than the 13th. 2 Hill, 375; 18 Alb. L. J. 437. See also *Taylor* v. *Corbiere*, 8 How. 385; *Easton* v. *Chamberlain*, 3 How. 412.

The reference made in section 788 of the Code of Civil Procedure does not limit the instances in which the rule of computation should be applied, but makes the rule applicable in sections originating in courts *not of record*. *Dorsey* v. *Pike*, 46 Hun, 112.

The rule is whenever a whole day, and every moment of it, can be counted, then it should be; but wherever, if counted, the party would in fact have but a fractional part of it, it should not be. *Phelan* v. *Douglas*, 11 How. Pr. 193, 8 Barb. 384, 28 Barb. 284.

In statute time, the day on which the time begins to run is excluded. *Judd* v. *Fulton*, 4 How. Pr. 298.

Fraction of a day will not be noticed except when material on the question of a lien. *Haden* v. *Buddensick*, 49 How. 241; *Ball* v. *Mander*, 19 How. 468, 10 Wend. 422.

Date of return.— The action was dismissed on the ground that the copy summons served did not contain the date of the return, but the record not showing that the paper purporting to be a copy was served at all, and it appearing from the return and affidavit of the marshal, and the affidavit of plaintiff's attorney that a copy of the summons was personally served, which was not traversed,— *Held*, that the judgment should be reversed. *Caldwell* v. *De Korven*, 66 N. Y. Supp. 309.

Day; mode of computing day; night time.— A calendar day includes the time from midnight to midnight. Sunday or any day of the week specifically mentioned means a calendar day. A number of days specified as a period from a certain day within which or after or before which an act is authorized or required to be done, means such number of calendar days exclusive of the calendar day from which the reckoning is made. Sunday or a public holiday, other than a half holiday, must be excluded from the reckoning if it is the last day of any such period or if it is an intervening day of any such period of two days. In computing any specified number of days, weeks, or months, from a specified event, the day upon which the event happens is deemed the day from which the reckoning is made. The day from which any specified number of days, weeks, or months of time is reckoned shall be excluded in making the reckoning.

Night time includes the time from sunset to sunrise.

Statutory Construction Act, § 27, as amended by chap. 447, Laws 1894. See *Bristed* v. *Harroll*, 20 Misc. Rep. 348; *Altman* v. *Syme*, 163 N. Y. 54.

Holidays.— As to what are legal, public, and half-holidays see notes to §§ 17, 31, and 37.

Mechanic's lien action.— For the return day and proceedings on the return day, see §§ 3404 and 3406, Code Civ. Proc.

Objections to the service, the summons, complaint, or other process should be made before appearing generally, joining issue, answer, or pleading, otherwise the objection is waived. An appearance in court should be stated to be for the specific purpose of the objection only. *Sperry* v. *Mayor*, 1 E. D. Smith, 361; *Cunningham* v. *Phillips*, 1 E. D. Smith, 417; *Andrews* v. *Thorp*, 1 E. D. Smith, 615; *Bray* v. *Andrews*, 1 E. D. Smith, 387; *Hogan* v. *Baker*, 2 E. D. Smith, 22; *Dempsey* v. *Paige*, 4 E. D. Smith, 218; *Andrews* v. *Bull*, 4 E. D. Smith, 384; *Ingersoll* v. *Gillice*, 3 E. D. Smith, 387; *Miln* v. *Russell*, 3 E. D. Smith, 303; *Robinson* v. *West*, 1 Sandf. 19; *Clapp* v. *Graves*, 26 N. Y. 418; *Abrahamson* v. *Koch*, 7 Misc. Rep. 122.

The objection that a summons was not properly served is not available in an answer or demurrer, but only on motion to set the proceedings aside. *Nones* v. *Hope Mut. Life Ins. Co.*, 8 Barb. 541, 5 How. 96, 3 Code Rep. 161.

Order of arrest.— The summons accompanying an order of arrest must be made returnable immediately. § 58.

Substituted service.— The defendant upon whom such service has been made is not in default until the expiration of six days after the filing of an affidavit showing service according to the order. *Smith* v. *Fogarty*, 6 Civ. Proc. Rep. 366.

Sunday extends from midnight to midnight. *Pulling* v. *People*, 8 Barb. 384; *Butler* v. *Kelsey*, 15 Johns. 177.

Process cannot be made returnable on Sunday. *Gould* v. *Spencer*, 5 Paige, 541; *Boyd* v. *Vandenkemp*, 1 Barb. Ch. 373; *Arctic Fire Ins. Co.* v. *Hicks*, 7 Abb. Pr. 204.

Sunday, when it is an intervening day, is counted, and is not excluded in computing time. *King* v. *Dowdall*, 2 Sandf. 131; *Easton* v. *Chamberlain*, 3 How. Pr. 412; *Taylor* v. *Corbiere*, 8 How. Pr. 385, 10 Wend. 422, 19 How. Pr. 468. When the last day comes on Sunday it must be excluded, and service upon the next day meets the requirements of this section. *Gribbon* v. *Freel*, 93 N. Y. 93.

The law will not take notice of parts of a day, and where a statute permitting a party to move upon notice to set aside the verdict of a jury expressly provides that the statute shall take effect immediately, and the case is tried upon the very day when the statute by its terms went into effect, the courts, deeming the statute to be in its nature remedial, will hold the statute to be applicable to the case tried upon the day in question. *Douglass* v. *Seiferd*, 18 Misc. Rep. 188.

§ 38. **Indorsement upon summons.**— In an action to recover a penalty or forfeiture given by a statute or ordinance if a copy of the complaint is not delivered to the defendant with a copy of the summons, a general reference to the statute or ordinance must be indorsed upon the copy of the summons so delivered in the following form: "According to the provisions of," et cetera; adding such a description of the statute or ordinance as will identify it with convenient certainty, and also specifying the section if penalties or forfeitures are given, in different sections thereof, for different acts or omissions, and the proof of service of such summons must show that the copy served on the defendant likewise had such indorsement thereon.

Notes to section 38.

This section is substantially section 1897 of the Code of Civil Procedure, and is taken therefrom. See also § 1, subd. 7, and § 27 and notes.

In *Mayor, etc.* v. *Eisler*, 10 Daly, 396; s. c., 2 Civ. Proc. Rep. 125, it was held that the requirements of section 1897 of the Code of Civil Procedure extend to an action by the corporation of the city of New York to recover a penalty for violation of a corporation ordinance.

Appearance is a waiver of indorsement on summons in an action to recover a penalty. *Vernon* v. *Palmer*, 48 N. Y. Super. 231; *Bissell* v. *N. Y. C. & H. R. R. R. Co.*, 67 Barb. 385.

Copy of summons served must be so indorsed.— Proof of service of a summons, the original being properly indorsed, is, it seems, not proof that the summons served was so indorsed. *People* v. *Walters*, 7 Civ. Proc. Rep. 406, 15 Abb. N. C. 461.

Insufficient reference to the statute.— Statement of the object of the action contained in the body of the summons is not a sufficient compliance with the statute. *In such an action* the statute must be literally complied with, and the notice must be indorsed upon, and not embodied in the summons. *Cox* v. *N. Y. C. & H. R. R. R. Co.*, 61 Barb. 615, criticised, *per* Bockes, J., *Schoonmaker* v. *Brooks*, 24 Hun, 553.

Held, in the same case, that the rule was the same, although the complaint accompanied the summons. This point ruled otherwise in *People* v. *Bull*, 42 N. Y. Super. 19; which is in accordance with the section as now framed.

Judgment by default.— A judgment by default is not void because the summons was not properly indorsed though reversible on appeal. *Spoor* v. *Cornell*, 12 Civ. Proc. Rep. 319.

No jurisdiction.— If the summons is not indorsed the court gets no jurisdiction. *Bissell* v. *N. Y. C. & H. R. R. R. Co.*, 67 Barb. 385.

Ordinances of the board of health.— Where proceedings are instituted against any person for a violation of an ordinance of the Board of Health of the city of New York, the particular ordinance violated should be specified in the complaint. *People ex rel.* v. *The Justices*, 12 Hun, 65. See also *Prussia* v. *Gunther*, 16 Abb. N. C. 230.

Other cases.— As this court has jurisdiction to recover penalties (§ 1, subd. 7), it will be found there are a large number of cases in which such an action may arise. For instance: For selling articles with a false stamp or bond. *Low* v. *Hall*, 47 N. Y. 104. For violation of the game laws. *Bellows* v. *Elmendorf*, 7 Lans. 462; *Phelps* v. *Racey*, 60 N. Y. 10. For selling lottery tickets. *Roediger* v. *Simmons*, 14 Abb. N. S. 256. For giving theatrical exhibitions without a license. *People* v. *Koll*, 3 Keyes, 266. For throwing ashes into New York harbor. *Board of Commissioners of Pilots* v. *Frost*, 5 Daly, 253.

Sufficient reference to the statute.— In an action for the recovery of a penalty for violation of a city ordinance, the ordinance was particularly mentioned and its substance indorsed upon the summons. *Held*, that this was sufficient. *The Mayor, etc.* v. *Wood*, 15 Daly, 341.

A summons issued in an action to recover penalties for a violation of the provisions of the Excise Law had upon it the following indorsement: "This summons is issued to collect penalties for violation of sections 13 and 14 of the act to suppress intemperance and to regulate the sale of intoxicating liquors, passed April 16, 1857, and the acts amendatory thereof" *Held*, that the indorsement was sufficient. *Ripley* v. *McCann*, 34 Hun, 112.

Summons not indorsed.— A judgment is not void because the summons was not properly indorsed in action for penalty though reversible on appeal. *Spoor* v. *Cornell*, 12 Civ. Proc. Rep. 319. But see *Bissell* v. *N. Y. C. & H. R. R. R. Co.*, 67 Barb. 385.

Waiver.— Appearance is a waiver of indorsement. *Vernon* v. *Palmer*, 48 N. Y. Super. 231; *Bissell* v. *N. Y. C. & H. R. R. R. Co.*, 67 Barb. 385.

Willful trespass.— The summons in an action for willful trespass to land, though claiming treble damages, need not be indorsed. *Sprague* v. *Irwin*, 27 How. Pr. 51.

§ 39. **Indorsement upon summons; where execution against the person may be issued.**— In an action where an execution may issue against the person upon a judgment rendered in favor of the plaintiff, unless a verified complaint is served with the summons, a general reference to that fact must be indorsed by the clerk upon the summons and upon the copy

to be served on defendant in the following form: "Plaintiff claims defendant is liable to arrest and imprisonment in this case." In the event of there being no such indorsement, no execution against the person shall issue, and the proof of service of such summons must show that the copy served on the defendant likewise had such indorsement upon it.

Notes to section 39.

This section is new and has been enacted in order that a defendant who is sued in a case where a body execution might issue may be apprised of the same. See § 38 and notes, and § 271 and notes.

Judgment where defendant is liable to arrest.— See § 251.

§ 40. **Parties; appearance of.**— A party to an action in the municipal court of the city of New York, who is of full age, may appear and prosecute or defend the same, in person or by an attorney, at his election, unless he has been judicially declared to be incompetent to manage his affairs.

Notes to section 40.

This section is taken from section 2886 of the Code of Civil Procedure and was formerly section 1294 of the Consolidation Act (Laws 1882, chap. 410), which was the same as Laws 1857, chap. 344, § 9.

Appearance.— The word "appearance" means a voluntary submission to the jurisdiction in whatever form manifested. *People* v. *Cowan*, 146 N. Y. 348.

Appearance without objection waives jurisdiction. *Abrahamson* v. *Koch*, 7 Misc. Rep. 122.

Where the jurisdiction of a justice in an action depends upon the voluntary appearance of a party, such party may assail or defend against a judgment rendered against him by showing that he did not appear, or that the appearance of any one for him was unauthorized. The provision of the Revised Statutes (1 R. S. 233, § 45), providing that the authority to appear in justice's court by attorney must be proved, unless admitted by the opposite party, was designed simply to protect the opposite party from an unauthorized appearance. A waiver of proof by such party cannot affect the rights of the party for whom the appearance is made. The distinction in this respect between justices' courts and courts of record having attorneys pointed out. *Sperry* v. *Reynolds*, 65 N. Y. 180.

Where defendant's wife appears on the return day of a summons to explain his absence, she is not his agent, so as to constitute an appearance by him. *Stromberg* v. *Carnese*, 35 Misc. Rep. 289.

Id.; failure to appear on adjourned day and dismissal of the action therefor loses jurisdiction of defendant, and plaintiff cannot thereafter restore the cause and take an inquest. *Abrams* v. *Fine*, 28 Misc. Rep. 533, 59 N. Y. Supp. 550.

Appearance by an attorney must be by filing a verified pleading or a written notice of appearance, or costs will not be allowed. See § 332.

Attorney's authority to appear for a party is to be presumed. *Oakley* v. *Workingmen's Union Ben. Soc.*, 2 Hilt. 487; *People ex rel. Allen* v. *Murray, Justice*, 50 N.Y. St. Rep. 535. The attorney who appears for the plaintiff is not bound to produce his authority, unless required by the defendant (*Silkman* v. *Boiger*, 4 E. D. Smith, 436); but he must have his authority to appear, if required to do so by the adverse party. *Timmerman* v. *Morrison*, 14 Johrs. 359; *Beaver* v. *Van Every*, 2 Cow. 429; *Hishfield* v. *Landman*, 3 E. D. Smith, 208. Parol authority to appear is sufficient, and the attorney himself is a competent witness to prove such authority. *Hotchkiss* v. *Leroy*, 9 Johns. 142, n.; *Murray* v. *House*, 11 Johns. 464; *Scott* v. *Elmendorf*, 12 Johns. 317; *Talloek* v. *Cunningham*, 1 Cow. 256; *Pixley* v. *Rutts*, 2 Cow. 421. The proper time to require proof of the attorney's authority is upon the appearance and before joining issue and going to trial, and it is too late after the trial has commenced. *Treadwell* v. *Bruder*, 3 E. D. Smith, 597. Unless the contrary is shown by proof, the appellate court will assume that a person appearing for a defendant was duly authorized so to do as his attorney or agent. *Oakley* v. *Workingmen's Union Ben. Soc.*, 2 Hilt. 487.

If the authority of the attorney to appear is in writing, the handwriting of the client may be established presumptively. Where letters were directed by the attorney to the client, at the residence of the latter, in relation to the subject-matter of a suit, and several answers were received in due course of mail, purporting to be signed by the client, all in the same handwriting, which letters contained a general authority to the attorney to take such steps, legal or otherwise, as he might deem advisable, for the recovery of the debt,—*Held*, the authority was sufficiently proved. *Bush* v. *Miller*, 13 Barb. 481. The authority of the attorney to appear may be inferred from other matters and circumstances, such as being attorney in other cases, and informing his client of his appearance and no objection expressed. *Bogardus* v. *Livingston*, 2 Hilt. 236.

Proof as to an attorney's authority to bring an action for personal injuries, his right where the action is settled by his client. *Whitesell* v. *New Jersey R. R. Co.*, 68 App. Div. 82.

An attorney appearing for a party without authority makes him liable for damages. *Blodgett* v. *Conklin*, 9 How. Pr. 442; *O'Hara* v. *Brophy*, 24 How. Pr. 379; *Ellsworth* v. *Campbell*, 31 Barb. 134; *Bogardus* v. *Livingston*, 2 Hilt. 236.

An attorney who commences an action without authority from the plaintiff is not entitled to compensation or costs. *Whitesell* v. *New Jersey & H. R. Ry. & Ferry Co.*, 68 App. Div. 82, 74 N. Y. Supp. (108 St. Rep.) 217.

General appearance for defendant by an attorney confers jurisdiction, although he was retained to appear only specially to have service of summons set aside, if he had authority to appear at all. *Kramer* v. *Gerlach*, 28 Misc. Rep. 525, 59 N. Y. Supp. 855.

A mere authority to an attorney to institute a suit, being revocable by the client, only entitles the attorney to compensation for services performed before its revocation. *Whitesell* v. *New Jersey & H. R. Ry. & Ferry Co.*, 68 App. Div. 82, 74 N. Y. Supp. (108 St. Rep.) 217.

Not an attorney.— Where a person, not regularly admitted to practice in the courts of record of the State of New York and not a party to an action, conducts it in this court, the judgment rendered therein is void as violative of Code Civ. Proc., §§ 63, 64. *Kaplan* v. *Berman*, 37 Misc. Rep. 502.

Attorneys and counselors-at-law.— Sections 55 to 81 of the Code of Civil Procedure treat of attorneys and counselors-at-law. The following sections are here inserted as of importance and beneficial to the orderly administration of justice in this court:

Party may appear in person or by attorney.— A party to a civil action who is of full age may prosecute or defend the same in person or by attorney, at his election, unless he has been judicially declared to be incompetent to manage his affairs. Each provision of this act relating to the conduct of an action wherein the attorney for the party is mentioned, includes a party prosecuting or defending in person, unless otherwise specially prescribed therein, or unless that construction is manifestly repugnant to the context. If a party has an attorney in the action, he cannot appear to act in person where an attorney may appear or act, either by special provision of law, or by the course and practice of the court. Code Civ. Proc., § 55.

Clerks, etc., sheriffs, etc., not to practice.— The clerk, deputy clerk, or special deputy clerk, a sheriff, under sheriff, deputy sheriff, sheriff's clerk, constable, coroner, *crier, or attendant of a court*, shall not, during his continuance in office, practice as attorney or counselor in any court. Code Civ. Proc., §§ 61, 62.

None but attorneys to practice in New York city.— A person shall not ask or receive, directly or indirectly, compensation for appearing as attorney in a court or before any magistrate in the city of New York, or make it a business to practice as an attorney in a court or before a magistrate in said city, unless he has been regularly admitted to practice as an attorney or counselor in the courts of record of the State. Code Civ. Proc., § 63.

Penalty for violation, or permitting violation of last section.— A person who violates the last section is guilty of a misdemeanor, and shall

be punished by imprisonment in the county jail, not exceeding one month, or by a fine of not less than $100 or more than $250, or by both such fine and imprisonment. A judge, justice, or magistrate within the city of New York, who knowingly permits to practice in his court a person who has not been regularly admitted to practice in the courts of record of this State, is guilty of a misdemeanor, and shall be punished as prescribed in this section. But this and the last section do not apply to a case where a person appears in a cause to which he is a party. Code Civ. Proc., § 64.

Death or disability of attorney; proceedings thereupon.— If an attorney dies, is removed or suspended, or otherwise becomes disabled to act, at any time before judgment in an action, no further proceeding shall be taken in the action against the party for whom he appeared until thirty days after notice to appoint another attorney has been given to that party, either personally or in such other manner as the court directs. Code Civ. Proc., § 65.

Agreement as to compensation.— The compensation of an attorney or counselor for his services is governed by agreement, express or implied, which is not restrained by law. From the commencement of an action or special proceeding, or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action, claim, or counterclaim, which attaches to a verdict, report, decision, judgment, or final order in his client's favor, and the proceeds thereof in whosoever hands they may come; and the lien cannot be affected by any settlement between the parties before or after judgment or final order. The court, upon the petition of the client or attorney, may determine and enforce the lien. Code Civ. Proc., § 66.

Punishment for deceit, etc.— An attorney or counselor, who is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or a party, forfeits, to the party injured by his deceit or collusion, treble damages. He is also guilty of a misdemeanor. Code Civ. Proc., § 70.

Id.; for willful delay of action.— An attorney or counselor who willfully delays his client's cause, with a view to his own gain, or willfully receives money, or an allowance for or on account of money, which he has not laid out or become answerable for, forfeits to the party injured treble damages. Code Civ. Proc., § 71.

Attorney not to lend his name.— If an attorney knowingly permits a person, not being his general law partner, or a clerk in his office, to sue out a mandate, or to prosecute or defend an action in his name, he, and the person who so uses his name, each forfeits to the party against whom the mandate has been sued out, or the action prosecuted or defended, the sum of $50, to be recovered in an action. Code Civ. Proc., § 72.

Attorneys, etc., privileged from arrest.— Is privileged from arrest while employed in a cause. See Code Civ. Proc., § 565.

Attorneys or counselors cannot be sureties or become bail.— See Rule 5 of the Supreme Court General Rules of Practice; *Miles* v. *Clark*, 4 Bosw. 632; *Craig* v. *Scott*, 1 Wend. 35; *Wheeler* v. *Wilcox*, 7 Abb. 73; *Coster* v. *Watson*, 15 Johns. 535.

Where however, without objection, he becomes surety, he is liable same as any other person. *Wilmont* v. *Meserole*, 48 How. 430; s. c., 16 Abb. N. S. 309.

Attorney who has served the summons cannot act as such when he has been deputed to and has served the summons in the action. Croker on Sheriffs, 382; *Ford* v. *Smith*, 11 Wend. 74; *Knight* v. *Odell*, 18 How. Pr. 279.

Duty to act as guardian of infant defendant, when ordered by the court. Rule 50, Supreme Court.

Attorney's authority to settle.— In the absence of specific authority, an attorney to whom a claim has been transmitted by a creditor for collection has no authority to accept a promissory note of the debtor, or that of a third person, in payment of the claim. *Finlay* v. *Heyward*, 35 Misc. Rep. 266, revg. s. c., 34 Misc. Rep. 818.

Clerk's fraud.— An attorney having an arrangement with his clerk to share a counsel fee with him is responsible for the clerk's fraud upon the client. *Matter of McGuinness*, 69 App. Div. 606.

Costs will not be allowed to the prevailing party unless he appeared by an attorney who filed a verified pleading or a written notice of appearance. See § 332.

Failure to appear on adjourned day and dismissal of the action therefor causes loss of jurisdiction of defendant, and plaintiff cannot thereafter restore the cause and take an inquest. *Abrams* v. *Fine*, 28 Misc. Rep. 533, 59 N. Y. Supp. 550.

Inexperience or negligence of attorney.— Where an attorney, through negligence or inexperience, performs useless labor, he cannot recover therefor, nor can he recover for services in an action wherein special evidence is necessary by statute, where he has failed to first ascertain the existence of such evidence. *Leo* v. *Leyser*, 36 Misc. Rep. 549, 73 N. Y. Supp. (107 St. Rep.) 941.

Where the negligence of an attorney in failing to plead the statute of frauds as a defense to an action brought against his client, results in the client's entire defeat therein, the latter may counterclaim his resulting damages against the attorney's demand for the value of his services in that action. *Patterson* v. *Powell*, 31 Misc. Rep. 20.

Lien of attorney.— An attorney's lien on his client's cause of action for fees and costs under Code Civ. Proc., § 66, where a plea of accord and satisfaction has been interposed, cannot be enforced without an order of court to allow the prosecution of the action, notwithstanding

the settlement. *Doyle* v. *New York, O. & W. Ry. Co.*, 66 App. Div. 398, 72 N. Y. Supp. (106 St. Rep.) 936.

Notice of lien not necessary.— An attorney need not give the other side notice of his lien, as section 66 is, in and of itself, notice. *Dolliver* v. *American Boat Co.*, 32 Misc. Rep. 264; *Vrooman* v. *Pickering*, 25 Misc. Rep. 277.

Enforcement of attorney's lien.— A settlement made by the defendant, after judgment, directly with a destitute plaintiff, in disregard of the agreed lien of her attorney for one-half of the amount of any settlement and costs, will be set aside at the instance of the attorney, although he had never given either the defendant or his attorney notice of the lien. *Vrooman* v. *Pickering*, 25 Misc. Rep. 277.

The lien attaches to the sum or value agreed upon in settlement, and he should foreclose it thereon by a suit in equity, making his client and the defendant parties, and may obtain an absolute judgment against his client for the amount of his compensation, with an alternative provision that the defendant shall pay the amount found due under the lien, if it cannot be collected of the client. *Dolliver* v. *American Boat Co.*, 32 Misc. Rep. 264.

Marshal.— By section 293 a marshal is prohibited to appear or act on behalf of any party in this court.

Party may settle notwithstanding attorney.— Notwithstanding the provisions of section 66 of the Code of Civil Procedure, giving plaintiff's attorney a lien on his client's cause of action, the latter may, before trial and without regard to his attorney, settle the action with the opposite party, and, provided the settlement is not collusive or fraudulent as to the attorney, that is to say, not intended by the parties to prevent him from getting his compensation, but is honest, the attorney's lien on the cause of action thereby ceases, and he may not continue the action for his own benefit, and to foreclose his lien. *Dolliver* v. *American Boat Co.*, 32 Misc. Rep. 264.

Value of services of an attorney.— In determining the value of services of an attorney, besides the conditions connected with the subject-matter, the professional standing of the claimant, his reputation in the specialty in which he was engaged, and the importance of the work done, measured by the values involved, the time taken, and the result of the services, are to be considered. *Schlesinger* v. *Dunne*, 36 Misc. Rep. 529, 73 N. Y. Supp. (107 St. Rep.) 1014.

§ 41. **Guardian ad litem.**— When a guardian is necessary he must be appointed by the court as follows:

1. If the infant be plaintiff, the appointment must be made before the summons is issued, upon the application of the infant, if he be of the age of fourteen years or upwards;

if under that age, upon the application of some relative or friend. The consent in writing of the guardian to be appointed and to be responsible for costs, if he fail in the action, must be filed with the clerk of the court, in the district in which the action is brought, except in cases where a free summons is provided for by this act.

2. After the service and return of a summons against an infant defendant no other proceedings shall be taken in the action, until a person has been appointed to appear as his guardian for the purpose of the action. Upon the nomination of the defendant, the court must appoint a proper person for that purpose. If the defendant does not appear upon the return of the summons, or if he neglects or refuses to nominate, the court may, on the application of the plaintiff, appoint any proper person as his guardian. The written consent of the person so appointed, must be filed with the clerk of the court before his appointment. The guardian so appointed is not responsible for any costs.

Notes to section 41.

This section is taken from section 1295 of the Consolidation Act (Laws 1882, chap. 410), which has been repealed, and from section 2888 of the Code of Civil Procedure, which was the same as Laws 1857, chap. 344, § 11.

When to be appointed.— The appointment of guardian must be made *before* the issuing of the summons, for if not made until *after* the summons issues, the proceedings are irregular. *Hill* v. *Thacter*, 2 Code R. 3; *Smart* v. *McChesney*, 14 Hun, 276; *Croghan* v. *Livingston*, 17 N. Y. 221.

An infant defendant must always have and appear by guardian (2 Johns. 192, 8 Johns. 418, 9 Johns. 160, 6 Wend. 526), even where the infant is sued with others (2 Johns. 192, 11 Johns. 460, 14 Johns. 417, 11 Wend. 612), and a justice has no right to proceed with the action until a guardian has been appointed. *Harney* v. *Large*, 51 Barb. 222.

He can arrest the trial and appoint a guardian. *Harney* v. *Large*, 51 Barb. 222.

Where defendant is an infant, and that objection is raised, the justice must appoint a guardian *ad litem* for him, and his refusal to do so is error. *Jessurun* v. *Mackie*, 24 Hun, 624; s. c., 61 How. 261.

"It is for the protection of such persons against what the law adjudged to be their own incompetency to choose attorney, or to conduct

their own litigations with suitable prudence and discretion." Per Johnson, J., in *Boylen* v. *McAvoy*, 29 How. 278.

Failure to appoint a guardian *ad litem* for an infant defendant is an irregularity for which the judgment must be reversed, if properly and timely presented. *Frost* v. *Frost*, 15 Misc. Rep. 167.

No judgment would be valid without such appointment. *Fish* v. *Ferris*, 3 E. D. Smith, 569.

Consent to be responsible for costs must be signed and filed by guardian *ad litem* as a condition of maintaining the action. *Weinstraub* v. *Metropolitan Life Ins. Co.*, 27 Misc. Rep. 540, 58 N. Y. Supp. 295.

Duty of attorney to act as guardian.— It shall be the duty of every attorney or officer of the court to act as the guardian of any infant defendant, in any suit or proceeding against him, whenever appointed for that purpose by an order of this court. And it shall be the duty of such guardian to examine into the circumstances of the case, so far as to enable him to make the proper defense, when necessary for the protection of the rights of the infant; and he shall be entitled to such compensation for his services as the court may deem reasonable.

But no order allowing compensation to a guardian *ad litem* shall be made, except upon an affidavit, to be made by such guardian, if an attorney of the court; or if the guardian be not an attorney, then on affidavit to be made by an attorney of the court who has acted in the matter in behalf of such guardian, showing that he has examined into the circumstances of the case, and has, to the best of his ability, made himself acquainted with the rights of his ward, and that such guardian has taken all the steps necessary for the protection of such rights, to the best of his knowledge, and as he believes, stating what has been done by him for the purpose of ascertaining the rights of the ward. Rule 50 of Supreme Court made applicable by section 20 of this act.

Infant; right to bring action as provided for in section 468 of the Code of Civil Procedure, is made applicable by section 3347 of said Code.

Parent and child; wages.— In general, whatever a child earns belongs to, and is to be recovered *in the name of the parent;* where there is no agreement, express or implied, that payment may be made to the child, the parent alone is entitled to his earnings, and the action must be brought in his name. *Shute* v. *Dorr*, 5 Wend. 204; *Letts* v. *Brooks*, Hill & Den. Supp. 36.

§ 42. **Parties; who may be joined.**— Parties plaintiff or defendant may be joined as follows:

1. All persons having an interest in the subject of the action, and in obtaining the judgment demanded, may be

joined as plaintiffs, except as otherwise expressly prescribed in this act.

2. Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party defendant, for the complete determination or settlement of a question involved therein, except as otherwise expressly prescribed in this act.

3. Every action must be prosecuted in the name of the real party in interest, except that an executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue, without,* joining with him the person for whose benefit the action is prosecuted. A person, with whom or in whose name, a contract is made for the benefit of another, is a trustee of an express trust, within the meaning of this section.

4. In an action or special proceeding a married woman appears, prosecutes or defends alone or joined with other parties as if she was single. It is not necessary or proper to join her husband with her as a party in any action or special proceeding affecting her separate property. The husband is not a necessary or proper party to an action or special proceeding to recover damages to the person or estate of his wife, and all sums that may be recovered in such actions, or special proceedings shall be the separate property of the wife. The husband is not a necessary or proper party to an action or special proceeding to recover damages to the person, or estate, of another on account of the wrongful acts of his wife committed without his instigation.

5. Two or more persons, severally liable upon the same written instrument, including the parties to a bill of exchange or a promissory note, whether the action is brought upon the instrument, or by a party thereto to recover against other parties liable over to him; may, all or any of them, be included as defendants in the same action, at the option of the plaintiff, and the joinder of a person, as defendant in an action, with another person as prescribed in this section, does not affect his right, to any order or other relief, to which he would have been entitled, if he had been separately sued in the action.

* The comma after the word "without" is in the original.

Notes to section 42.

This is a new section: We pointed out in the *Fourth Edition* of this work, on page 141, in our note to section 1297 of the Consolidation Act, entitled "The summons," that there was no mention made of parties plaintiff in that section, and that there is no section in the Consolidation Act treating of parties; but that provisions of law on that subject were certainly necessary, and we thought the most appropriate place to insert them was under section 1297. We further pointed out that sections 446, 449, 450, and 454 of chapter 5, title II, "Parties to Action," article first, "Parties Generally," of the Code of Civil Procedure, are made applicable to this court by section 3347, subdivision 3 of the Code.

The Legislature has now revised these sections of the Code and embodied them in the five subdivisions of this section.

Subdivision 1 is taken as a whole from section 446.

Subdivision 2 is made up of section 447, which was not made applicable by section 3347.

Subdivisions 3 and 4 are the same as sections 449 and 450, respectively.

Subdivision 5 is composed of sections 454 and 455. See also section 146, "What causes of action may be joined in the same complaint."

For decisions upon these sections of the Code we refer the practitioner to the numerous and various decisions to be found in the copiously annotated Codes of Civil Procedure.

Department of health.— Parties defendant to an action by the department of health may be all who participated in the act, refusal, or omissions complained of, and the recovery may be against one or more, as the justice directs. Charter, § 1262.

Milk and cream cans.— The agent of the owner, dealer, or shipper has full power to sue in his own name without joining the real party in interest that he represents, and may join in one proceeding as plaintiffs or defendants, or both, as many different persons as shall jointly or severally have violated any of the provisions of this act, notwithstanding that the cause of action is separate and distinct as to each and every one of such plaintiffs and defendants, and may recover against any one or more of such person or persons. Laws 1896, chap. 376 (Domestic Commerce Law), § 29.

§ 43. **Application of this article to defendants jointly liable.** — The last section does not affect a defense or other objection of a defendant, growing out of the failure to join in the action two or more persons jointly liable; and as regards the other parties to the action, persons jointly liable

are regarded as one party, for every purpose contemplated by that section.

Notes to section 43.

This section is taken from section 457 of the Code of Civil Procedure. See notes to § 42.

There is no "article" applicable to defendants jointly liable. This section is included in title II, "Actions; Summons, Parties," which contains no article.

Action against joint debtors not served.— See § 268.

§ 44. **Where employee is party.**— When an action is brought by an employee against an employer for services performed by such employee, male or female, the clerk of the said municipal court in the district in which the action is brought, shall issue, a free summons when the plaintiff's demand is less than fifty dollars and the plaintiff is a resident of the city of New York, and proof by the plaintiff's own affidavit that he has a good and meritorious cause of action and of the nature of such action and of said plaintiff's residence, and whether previous application therefor has been made, shall be duly presented to and filed with the clerk of the municipal court where such action shall be brought and he shall not demand or receive any fee whatsoever from the plaintiff or his agents or attorneys in such action, unless the plaintiff shall demand a trial jury, in which case the plaintiff must pay to the clerk of the municipal court where such action shall be pending the sum of four dollars and fifty cents.

Notes to section 44.

This section was formerly the larger part of section 1416, subdivision 9 of the Consolidation Act (Laws 1882, chap. 410), as amended by Laws 1887, chapter 307, page 380, and contained in the Charter of 1897, as amended in 1901, and is substantially the same. See also §§ 45 to 53 of this act, as to prosecution and defense by a poor person.

Costs in action by working-woman.— See § 340.

Execution.— As to execution in favor of "employee," or "wage-earner," see § 274.

Judgment in favor of wage-earners.— See § 274, and notes.

Jury trial.— As to trial by jury, drawing the jury, etc., see § 231.

§ 45. **Who may petition for leave to prosecute as a poor person.**— A person whether an adult or infant, who alleges that he has a cause of action against another person, may apply by petition to the court for leave to prosecute as a poor person, and to have an attorney and counsellor assigned to conduct his action.

Notes to section 45.

This section is taken from section 458 of the Code of Civil Procedure, which was made applicable to this court by section 3347, subdivision 3 of said Code.

Poor person defined.— *Isnard* v. *Cazeaux*, 1 Paige, 39.

Application, when can be made.— A motion to sue as a poor person may be made after action brought and any time during its pendency, and is not barred by an order to file security for costs. *Shapiro* v. *Burns*, 7 Misc. Rep. 418; s. c., 31 Abb. N. C. 144.

Guardian.— A guardian cannot sue *in forma pauperis*. The reasons stated. *In re Daly*, McAdam, J., 1 City Ct. Rep. 437. To the contrary. *Irving* v. *Garritty*, 13 Abb. N. C. 182.

Infant can sue as a poor person. *Erickson* v. *Poey*, 5 Civ. Proc. Rep. 379, 387; affd., s. c., 96 N. Y. 669; *Hickman* v. *Mackey*, 19 Abb. N. C. 394.

Wealth of guardian ad litem.— The wealth or poverty of the guardian *ad litem*, though father of the plaintiff, is no answer to the motion for leave to sue as a poor person. *Shapiro* v. *Burns*, 7 Misc. Rep. 418; s. c., 31 Abb. N. C. 144; *Ryan, Admr.* v. *Potter*, 4 Civ. Proc. Rep. 80.

Nonresident cannot sue as poor person, at least doubted. *Thomas* v. *Wilson*, 6 Hill, 257; *Alexander* v. *Myers*, 8 Daly, 112.

Cannot be done. *Anonymous*, 10 Abb. N. C. 80; *Christian* v. *Gonge*, 10 Abb. N. C. 82.

Fees.— Poor person may prosecute without paying any fees to any *officer*. Code Civ. Proc., § 461, made applicable by section 3347 of subdivision 3 of said Code.

Jury fees.— If a jury trial is demanded by a person suing *in forma pauperis*, it seems that a strict adherence to the statute does not entitle him to exemption from payment of jury fees on demanding a jury. Section 231 provides for the payment of the jurors' fees for summoning the jury. Section 461 of the Code of Civil Procedure made applicable to this court by section 3347, subdivision 3 of said Code, specifies "without paying fees to any *officer*," and jurors are not "*officers*."

Practice on removal of action of poor person.— See notes to § 3 of this act, "Proceedings after removal in City Court."

Statute to be strictly construed.— The statute in reference to permitting persons to sue *in forma pauperis*, should be strictly construed. The reasons stated. *Zernier* v. *Schmaltz*, 1 City Ct. Rep. 435.

Security for costs.— Plaintiff cannot be required to file security for costs, if permitted to sue *in forma pauperis*, nor permitted so to prosecute if required to file such security. *Florence* v. *Bulkley*, 12 N. Y. Leg. Obs. 28.

§ 46. **Contents of petition.**— The petition must state:

1. The nature of the action brought or intended to be brought.

2. That the applicant is not worth one hundred dollars, besides the wearing apparel and furniture necessary for himself and his family, and the subject matter of the action and whether he has made any previous application for leave to sue as a poor person. It must be verified by the applicant's affidavit, unless the applicant is an infant under the age of fourteen years, and in that case by the affidavit of his guardian appointed in said action, and supported by a certificate of a counsellor at law to the effect that he has examined the case and is of the opinion that the applicant has a good cause of action. The petition may, however, be verified before the clerk or assistant clerk of said municipal court in the district in which the action is brought, and the certificate of said clerk or assistant clerk, that he has inquired into the facts of the case and that in his opinion the plaintiff has a prima facie cause of action, shall have the same force and effect as the certificate of an attorney.

Notes to section 46.

This section is taken from section 459 of the Code of Civil Procedure.

When not sufficient.— A petition by an infant for leave to prosecute an action as a poor person, which merely states that the petitioner has not now the means to prosecute the action, but does not state that she cannot procure such means, or that she will be unable to present her cause unless the order is granted, and which further states that the petitioner receives wages, but does not show the amount or disposition thereof, or that her parents are unable to support her, is insufficient to justify the granting of the order. *Kaufmann* v. *Manhattan R. R. Co.*, 68 App. Div. 94.

§ 47. **Order and petition to be filed; when counsel assigned.**— The court to which the petition is presented, if satisfied of the truth of the facts alleged, and that the applicant has a good cause of action, may, by order, which may be endorsed on petition, admit him to prosecute as a poor person, and where there is a certificate of a counsellor at law, as prescribed in the last section, may assign to him an attorney and counsel to prosecute his action, who must act therein without compensation. Such petition and order must be filed with the clerk of the court in the district in which the action is brought.

Note to section 47.

This section is taken from section 460 of the Code of Civil Procedure.

§ 48. **When leave may be annulled.**— If the person so admitted is guilty of deception in the petition or of improper conduct in the prosecution of the action, or of wilful or unnecessary delay, the court may, in its discretion, annul the order, admitting him to prosecute as a poor person; and he shall thereafter be deprived of all the privileges conferred thereby.

Notes to section 48.

This section is substantially the same as section 462 of the Code of Civil Procedure.

Agreement with the attorney, whereby he has an interest in any recovery, as compensation for his services, is fatal to plaintiff's right to continue the action as a poor person, and in such case an order permitting the prosecution will be reversed. *Cahill* v. *Manhattan Ry. Co.*, 38 App. Div. 314, 57 N. Y. Supp. 10.

Notice.— A party to whom leave has been granted to sue as a poor person who neglects to call the attention of his opponent or the court to the order until after the entry of judgment and taxation of costs loses all rights under the order. *Oakes* v. *High et al.*, 11 Misc. Rep. 313.

§ 49. **When defendant may defend as a poor person, et cetera.** — A defendant in an action in said court may petition the court in which the action is pending for leave to defend the action as a poor person, and to have an attorney and counsellor assigned to conduct his defense; as follows:

1. By an oral application made in open court, by defendant, on the return day, and a statement under oath, of the same matters, respecting his ability as are required to be contained in a petition for leave to prosecute as a poor person; or

2. By a petition verified before the clerk or assistant clerk, accompanied by his certificate relating to the defense in the same manner as prescribed in section forty-two of this act; or

3. By a verified petition supported by a certificate of a counsellor at law relating to the defense, in the same manner as prescribed in section forty-two of this act.

Note to section 49.

This section is constructed from sections 463 and 464 of the Code of Civil Procedure.

§ 50. **Defendant's order.**— The court to which the application is made or petition is presented as prescribed in the last section, if satisfied of the truth of the facts stated as to defendant's ability, and that the applicant has a good defense if proved on the trial, may, by order, admit him to defend as a poor person and may assign counsel to conduct his defense, or may, in case of verified pleadings, direct the clerk or assistant clerk of said court, to prepare and file an answer, verified before him by defendant, or may assign a counsellor at law present in court to prepare and file an answer which may be verified before the clerk or assistant clerk of said court.

Note to section 50.

This section is new, and necessarily follows the granting of the application mentioned in section 49.

§ 51. **Leave may be annulled as in case of plaintiff.**— The provisions relating to an order to be made upon an application for leave to prosecute as a poor person and the proceedings subsequent thereto apply to an order and subsequent proceedings upon an application for leave to defend as a poor person.

Note to section 51.

This section is the same as section 465 of the Code of Civil Procedure.

§ 52. **Appeal where plaintiff or defendant poor person.**— An order made as prescribed in this article, does not authorize the petitioner to take or maintain an appeal as a poor person; but where an appeal is taken by the adverse party the order is applicable in favor of the petitioner as respondent in the appeal.

Note to section 52.

This section is the same as section 466 of the Code of Civil Procedure.

§ 53. **Costs in favor of petitioner.**— Where costs are awarded in favor of a person who had been admitted to prosecute or defend as a poor person as prescribed in this article, they must be paid over to his attorney, when collected from the adverse party and distributed among the attorneys and counsel assigned to the poor person, as the court directs.

Notes to section 53.

This section is the same as section 467 of the Code of Civil Procedure, so much so that the words "as prescribed in *this article*" have been retained, whereas there is no "article" of title 11, entitled "Actions; Summons; Parties," commencing with section 25 and ending with this section.

Costs.— The court will not exempt the applicant from liability for costs accrued *before* the application. *Lyons* v. *Murat*, 4 Abb. N. C. 13.

Stay.— Where the action is *in forma pauperis* it cannot be stayed on account of the nonpayment of costs awarded against the plaintiff in a previous action. *Herbert* v. *Drake*, 2 City Ct. Rep. 175.

Note.— There is no section 54.

TITLE III.

Provisional Remedies; and Actions to Foreclose a Lien on a Chattel.

ARTICLE I. Order of arrest.
II. Attachment.
III. Replevin.
IV. Action to foreclose a lien on a chattel.

ARTICLE I.

Order of Arrest.

SECTION 55. Process to be served by marshal.
56. In what cases order of arrest to be granted.
57. Affidavit and undertaking upon granting
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64. Bail or deposit after return.
65. When and how defendant to remain in custody.
66. Duty of marshal.
67. Undertaking by arrested defendant on applying for adjournment.
68. Motion to discharge from arrest.
69. Privilege from arrest.
70. Sections applicable as to undertakings, et cetera.

§ 55. **Process to be served by marshal.**— An order of arrest, warrant of attachment or requisition to replevy, issued by or out of the municipal court of the city of New York, shall be served and executed by a marshal of the city of New York.

Note to section 55.

This section is taken from section 1302 of the Consolidation Act (Laws 1882, chap. 410), leaving out the words "other process, issued by or out of this court," so that it is no longer required that the marshal shall serve the summons, leaving this section consistent with section 36, by which any person not a party to the action who is over eighteen years of age, may serve the summons.

§ 56. **In what cases order of arrest to be granted.**— An order to arrest the defendant must or may be granted, directed to any marshal of said city, in the following cases, but no female can be arrested except for a wilful injury to person or property:

1. In an action for the recovery of damages, in a cause of action not arising on contract, when the defendant is not a resident of the city of New York, or is about to remove therefrom, or when the action is for a wilful injury to person or property.

Notes to section 56.

This section is substantially the same as section 1304 of the Consolidation Act (Laws 1882, chap. 410), which section was taken from the old District Court Act (Laws 1857, chap. 344, § 16), with the provision as to the arrest of a female, which was formerly contained in the last subdivision of section 1304 of the Consolidation Act, it has now been placed in the preamble of this section.

In *Rosenthal* v. *Grouse*, 12 Daly, 529; s. c., 7 Civ. Code Rep. 135, and 1 How. (N. S.) 44, the court severely but justly criticised the Legislature for enacting conflicting provisions relating to orders of arrest and warrants of attachment in this court causing a justice thereof to err in upholding a provisional remedy, as there was a *casus omissus* in the law. This case is well worth the attention of the student and of the practitioner to show how "fearfully and wonderfully" laws are sometimes enacted. See also notes to § 75.

Notes to section 56, subdivision 1.

Arrest is to punish for the tort.— Arrest is allowed, not as a security for the debt, but as punishment for tort. *Nat. Bank of Commonwealth* v. *Temple*, 39 How. Pr. 432.

Id.; is a provisional remedy and does not affect cause of action.— The order of arrest is a provisional remedy, and its granting or vacating does not affect the plaintiff's cause of action and right to judgment thereon. *In re Zeitz*, 12 Civ. Proc. Rep. 423.

Id.; of female.— A willful injury for which a female may be arrested is defined in *Duncan* v. *Shaw*, 6 Hun, 1, as "Any disturbance of the right of the owner to an article, to have, use, and enjoy it, securely and without molestation, is an injury for which the law gives an action, irrespective of any damage to the thing itself, in which the right of property exists. Persuading and inducing a clerk of plaintiff to take from them and to give defendant, a female, gold certificates, which she willfully converted, is such willful injury, and she is liable

to arrest." See also *Northern R. R. Co.* v. *Carpenter*, 3 Abb. Pr. 259; s. c., 3 How. 222, 1 Hilt. 179.

Borrowed money by falsely representing that worthless bonds delivered as security are good, subjects a female to arrest. *Eypart* v. *Bolenius*, 2 Abb. N. C. 193.

Arrest, order of; where may be served.— Section 9 of this act authorizes the process of this court and other mandates to be sent to and executed in any part of the city of New York, and the court has power to enforce obedience thereto.

Cause of arrest must be applicable to all the claims in the complaint. *Bassett* v. *Pitts*, 15 Hun, 464; *Madge* v. *Ping*, 71 N. Y. 608, revg. s. c., 12 Hun, 15; *Ely* v. *Steiger*, 9 Abb. Pr. N. S. 35; *Toffey* v. *Williams*, 5 Sup. Ct. (T. & C.) 294.

Conditional sale agreement.— No order of arrest shall issue in an action on such agreement. See § 139 of this act. But if the property is willfully or maliciously disposed of or concealed, an order of arrest may be granted. See § 140 of this act.

Judgment.— An order of arrest may be granted in an action on a judgment for a debt fraudulently contracted. The fraud is not merged in the judgment. *Greenbaum* v. *Stein*, 2 Daly, 223.

Mechanic's lien.— An order of arrest for fraudulently contracting the debt may be granted in an action to enforce a mechanic's lien. *Burbridge* v. *Hart*, 54 How. 455.

New contract; effect of.—Acceptance by the creditors of bonds, merely as security for the demand, and which are inadequate security, does not preclude arrest. *Dubois* v. *Thompson*, 1 Daly, 309; s. c., 28 How. Pr. 418. See also *Murphy* v. *Hernandez*, 10 Bosw. 665; *Nelson* v. *Blanchard*, 54 Barb. 630.

The fact that a creditor has accepted the promissory note of his debtor for money due him, received in a fiduciary capacity, is no bar, after the dishonor of the note, to an arrest in an action on the original indebtedness. But the plaintiff must be ready to return the note. *Shipman* v. *Shafer*, 14 Abb. Pr. 449. But see also to the contrary, *Nelson* v. *Blanchfield*, 54 Barb. 630, and *Trunninger* v. *Buseh*, 7 Daly, 124.

Partners cannot arrest each other. *Cary* v. *Williams*, 1 Duer, 667; *Smith* v. *Small*, 54 Barb. 223.

Place.— Arrest may be ordered of a defendant within the jurisdiction without reference to where the fraud was committed, or whether the property was ever brought here. *Brown* v. *Ashbough*, 40 How. Pr. 226.

A defendant may be arrested, in a civil action, for fraudulently procuring possession of property in a foreign country, if he brings the proceeds of his fraud into this State; and this, whether he could have been arrested there for fraud or not. The remedy is governed by the *lex fori*. 2 Johns. 148, 11 Johns. 194, 14 Johns. 364; *City Bank* v. *Lumley*, 28 How. Pr. 397.

2. In an action for a fine or penalty, or for money or property embezzled or wrongfully misapplied or converted to his own use by a public officer, or an officer of a corporation, or an attorney, factor, broker, agent or clerk, in the course of his employment as such, or by any other person acting in a fiduciary capacity.

Notes to section 56, subdivision 2.

Auctioneer receiving goods for sale, and to retain all over a certain amount, failing to pay that amount, is liable to arrest. *Holbrook* v. *Homner*, 1 Code Rep. N. S. 406; s. c., 6 How. Pr. 86; *Barrett* v. *Gracie*, 34 Barb. 20.

Broker for the purchase of coin and stock, receiving a deposit of money as security against loss in such transaction, is liable to an arrest in an action for the balance of account, as for money received in a fiduciary capacity. *Clark* v. *Pinkney*, 50 Barb. 226.

A stock broker, who, having received money to make a special purchase, and used it for some other purpose, was arrested and held. *Dubois* v. *Thompson*, 1 Daly, 309; s. c., 25 How. Pr. 417.

Claim by third person, interposed to moneys which the defendant had received in a fiduciary capacity for the plaintiff, wherefore he refused to pay it over, lest he should be liable, does not affect the plaintiff's right to have defendant arrested in an action to recover such money. *Gross* v. *Graves*, 19 Abb. Pr. 95.

Factors and commission merchants.— A commission merchant who receives butter to sell on commission acts in a fiduciary capacity and is liable to arrest for failure to pay over the net proceeds after said sale. *Schudder* v. *Shields*, 17 How. 420; *Ostell* v. *Brough*, 24 How. 274.

An agreement, by the terms of which a person receives from time to time the goods of merchants which he is authorized to sell for their account to customers of his own finding, upon a compensation to him of a percentage of the profits upon his sales, with authority to him to collect and with a subsequent accountability for the proceeds collected, creates a fiduciary relation. The failure of the agent to account for the proceeds of his sales makes him liable to his principals, in an action upon contract, but does not render him guilty of a conversion. *Wright* v. *Duffie*, 23 Misc. Rep. 339. See also *Standard S. R.* v. *Dayton*, 70 N. Y. 486. Examine however *Duguid* v. *Edwards*, 23 How. Pr 254; s. c., 50 Barb. 288, and *Fuentes* v. *Muyorga*, 7 Daly, 103.

The relation of the parties in this respect is not substantially altered by the fact that he has also guaranteed the sales made by him, receiving an additional compensation therefor. *Ostell* v. *Brough*, 24 How. Pr. 274; *Angus* v. *Dunscomb*, 8 How. Pr. 14; *Sutton* v. *De Camp*, 4 Abb. Pr. N. S. 483.

Agreement by which a factor engaged to transfer notes and bills taken by him on the sale of goods, to the defendants, in consideration of their guaranteeing payment to the principal. *Held*, that such notes, and their proceeds in the hands of the defendants, were received in the fiduciary capacity for account of the principal, and might be followed in the hands of any person not a purchaser for value. *Chaine* v. *Coffin*, 17 Abb. Pr 441.

If a factor mingles the proceeds of the sale of his consignor's property with his own funds, by depositing them in the bank to his credit in general account and uses the money in his business generally, he is liable to arrest on failure to pay the same on demand. *Duguid* v. *Edwards*, 50 Barb. 288. And see *Farmers, etc., Bank of Buffalo* v. *Sprague*, 52 N. Y. 605.

It must appear that the identical money received must be the property of the creditor, which it is the duty of the debtor to pay over, not that he could pay with any funds of his own. *State* v. *King*, 8 How. Pr. 298; *Republic of Mexico* v. *Arangoiz*, 5 Duer, 634; *Duguid* v. *Edwards*, 50 Barb. 288; *Wood* v. *Henry*, 40 N. Y. 124; *Lewis* v. *Prosser*, 53 N. Y. 260. And see 1 Wait's Pr. 612, 622; *Morange* v. *Waldron*, 6 Hun, 529.

3. Where the defendant has been guilty of a fraud in contracting the debt, or incurring the obligation for which the action is brought, or in concealing or disposing of the property, for the taking, detention, or conversion of which the action is brought.

Notes to section 56, subdivision 3.

Action before time of credit expires.— If a sale of goods on credit be induced by fraudulent representations, suit for the value may be commenced before the termination of the credit. *Reid* v. *Martin*, 4 Hun, 590.

Assignment of claim.— The defendant having fraudulently obtained money and other personal property from the mother of plaintiff, who afterward died intestate, and the administrator having assigned the intestate's claim to plaintiff,—*Held*, that an order of arrest was properly granted. *Valentine* v. *Richardt*, 17 Civ. Proc. Rep. 289, 24 N. Y. St. Rep. 697.

Plaintiff's ownership of a note assigned to him by the payee is sufficient to sustain an action for fraud in incurring the debt, without showing any assignment of the claim for damages to him. *Ryle* v. *Brown*, 50 N. Y. Super. 174.

Availing of false credit.— If a deposit in bank by one person, which by mistake of the bookkeeper is credited to another, is drawn out and

appropriated by the latter with knowledge of the mistake, it is fraud for which he may be arrested. *Nat. Broadway Bank* v. *Miller*, 11 N. Y. Daily Reg. No. 119, affg. 4 Week. Dig. 31.

Bailment and conversion.— Goods delivered upon an agreement to return them or pay for them may be regarded as a bailment, and not a sale, and the bailee is liable to arrest for a conversion. *Person* v. *Cliver*, 29 How. Pr. 432, revg. s. c., 28 How Pr. 139. See also *Barnett* v. *Selling*, 9 Hun, 236.

Arrest; boarding-house-keeper's lien.— An action claiming a lien on defendant's baggage and wardrobe for board, which property had been clandestinely removed, is an action for the "wrongful conversion of personal property," for which a justice is allowed to issue an order for the arrest of defendant, and the justice erred in refusing to insert in a judgment for plaintiff the liability of defendant to arrest on execution. *Babcock* v. *Smith*, 19 N. Y. Supp. 817. See also *Searing* v. *Goldstein*, 11 Daly, 236.

Chattels.— In an action for the recovery of, wrongfully detained, an order of arrest may issue and require the holding of the defendant to bail. *Tracy* v. *Griffin*, 50 Barb. 70.

In order to sustain an arrest of defendant in replevin, the complaint must allege that the chattel or a part thereof has been concealed, removed, or disposed of, so that it cannot be found or taken by the sheriff with intent, etc., as provided in Code Civ. Proc., § 549, which requirement is jurisdictional, and it is not enough that if the action had been conversion the order of arrest would be justified. *Michaelis* v. *Towne*, 59 N. Y. Supp. 721.

Check sent by mistake.— In an action for injury to and for the detention and conversion of personal property, the plaintiff sent the defendant a check for goods for which he had already paid, and the defendant, knowing the mistake, retained and converted it. *Held*, order of arrest properly granted. *Agar* v. *Haines*, 15 N. Y. St. Rep. 361.

Conversion of check.— Where plaintiff deposited a check of a third party with defendant, for collection only, and the proceeds were to be applied to a special purpose, instead of appropriating it to the use for which it was deposited, he gave him credit for the amount with interest. An order of arrest for the conversion of the proceeds of the check was proper. *Eckert* v. *Belden*, 1 Law Bull. 61.

Conversion of money to pay note.— A check was given to pay a note, the check was paid, but the note not taken up by defendant, for which he was held liable for a fraudulent conversion of money received in a fiduciary capacity. *Wandell* v. *Burnett*, 22 Misc. Rep. 315, 49 N. Y. Supp. 109. See also *Lowell* v. *Martin*, 11 Abb. 126.

Conversion of promissory note.— An order of arrest may be granted against one who has used a promissory note of the plaintiff given for a specific purpose contrary to the agreement, and does not deliver it up

when the agreement has been complied with. *Ertell* v. *De Pennevet*, 14 Civ. Proc. Rep. 366. And see *Easton* v. *Cardwell*, 11 Civ. Proc. Rep. 301.

Fraud committed in contracting a debt for the sale of goods subjects the offender to an arrest for the amount of the debt, whether such fraud would avoid the sale or not. *Wallace* v. *Murphy*, 22 How. Pr. 414.

So where a vendee purchases property on credit, knowing that he is insolvent, without disclosing the fact. *Wright* v. *Brown*, 67 N. Y. 1.

Defendant borrowed money on a promise to apply it to a specific purpose, and converted it to another. *Held*, that he was liable to arrest for a fraud in contracting the debt. *Lovell* v. *Martin*, 11 Abb. Pr. 126.

Applies only to actions brought to enforce a contract liability, and not to those where fraud or deceit is the gist of the action. *McGovern* v. *Payne*, 32 Barb. 83; *Smith* v. *Cobriere*, 3 Bosw. 634.

What is necessary to constitute a fraudulent sale. See *Hoyt* v. *Godfrey*, 88 N. Y. 669.

Contemporaneous.— A direct misrepresentation to plaintiff having been proved, it is competent to prove similar fraudulent misrepresentation to others as bearing upon the question of intent, but the latter was not alone sufficient, though communicated to plaintiff, unless it is shown they were intended to be so communicated. *Van Kleek* v. *Leroy*, 4 Abb. N. S. 431, 4 Abb. Ct. App. Dec. 479, affg. 37 Barb. 544.

Where the question is whether the vendee procured the sale of the goods through fraud, evidence is admissible of purchases made by him at or about the same time, involving similar frauds. *Hall* v. *Naylor*, 18 N. Y. 588, revg. 6 Duer, 71; *Van Kleek* v. *Leroy*, 4 Abb. N. S. 431.

Partner, fraud by.— In the absence of proof that the other partners knew of the fraud, only the one who was actually guilty of it can be arrested. *Hanover Co.* v. *Sheldon*, 9 Abb. 240; *Hitchcock* v. *Peterson*, 14 Hun, 389; *Wetmore* v. *Earle*, 9 Abb. 58, n.; *National Bank of C.* v. *Temple*, 39 How. Pr. 432.

False representations as to the responsibility of a firm, made with intent to defraud, are good grounds for the arrest of the partner making them. *Whitmark* v. *Herman*, 44 N. Y. Super. 144.

Where a partner, on being notified of a fraud committed by his copartner, omits to repudiate the act, he will be held to have adopted the fraudulent act, and will be deemed a joint wrongdoer. *Hawkins* v. *Appleby*, 2 Sandf. 241. And see *Anonymous*, 6 Abb. 319, n.

See, however, the cases holding: In an action to recover a copartnership debt, in the contracting of which some of the partners were guilty of a fraud, all the parties are liable to an arrest. *Townsend* v. *Bogart*, 11 Abb. Pr. 355, 1 Hill, 311, 2 Sandf. 421; *Coman* v. *Reese*, 21 How. Pr. 114; *Bull* v. *Meliss*, 9 Abb. Pr. 58; *Anonymous*, 6 Abb. Pr. 319; *Sherman* v. *Smith*, 42 How. Pr. 198; *Hitchcock* v. *Peterson*, 14 Hun, 389.

Each partner is liable to arrest for the frauds committed by the other members of the firm, although he may have been entirely ignorant of such frauds. *Matter of Benson*, 11 Week. Dig. 394.

Purchases on the eve of bankruptcy.— A defendant purchased goods on a credit of thirty days, and within that time became insolvent, giving no explanation. *Held* liable to arrest. *Dale* v. *Jacobs*, 10 Abb. N. S. 382; *Reid* v. *Martin*, 4 Hun, 590.

An attempt to postpone payment for a week, and failing within two days thereafter,— *Held* to be conclusive evidence of intent to defraud. *Smith* v. *Frank*, 2 Robt. 626.

Liable where debt incurred and credit obtained on a false allegation of solvency. *Freeman* v. *Leland*, 2 Abb. Pr. 479; *Mitchell* v. *Warden*, 20 Barb. 253.

Infant.— An infant who makes false statements as to his property when buying goods other than necessaries cannot be made liable to arrest by bringing the action in fraud. *Taylor* v. *Van Keuren*, 54 How. 25. And see *Stern* v. *Meikleham*, 31 N. Y. St. Rep. 608.

Joint debtors.— A deceit practiced by one of two joint debtors in inducing the creditor to accept his check, postdated and indorsed by the other, is not ground for authorizing his arrest in an action on the check against both. *Woodruff* v. *Valentine*, 19 Abb. 93.

Misrepresentations.— Where a person, to induce another to contract with him, makes statements which he knows to be false, or if he intends to convey the impression that he has actual knowledge of their truth, when he has not such knowledge, and they are in fact false, he commits a fraud. *Bishop* v. *Davis*, 9 Hun, 342. And see *Scudder* v. *Barnes*, 16 How. 534; *Hubbard* v. *Richardson*, 31 App. Div. 520, 52 N. Y. Supp. 35.

"Obligation," used in this section, is not used in its strict sense of a special contract. It is equivalent to the words "legal liability" or "legal duty." *Crandall* v. *Bryan*, 5 Abb. Pr. 162.

Principal and agent.— The principal cannot be arrested for the fraud of the agent, without personal knowledge on his part in respect thereto, or ratification thereof. *Claflin* v. *Frank*, 8 Abb. Pr. 412; *Hathaway* v. *Johnson*, 55 N. Y. 93; *Stewart* v. *Stoisburger*, 7 Hun, 337.

Scienter.— It must be shown that the defendant knew, at the time of making them, that the allegations were false; otherwise he is not liable to arrest. *Gafney* v. *Burton*, 12 How. Pr. 516, 18 N. Y. 299, 40 N. Y. 562.

Where a person, to induce another to contract with him, makes statements known by the former to be false, or where he intends to convey the impression that he has actual knowledge of their truth, when conscious that he has not such knowledge, and they are in fact false, he thereby commits a fraud upon the other party.

When such representations are affirmative in character, positive and unequivocal, without condition or qualification, and are not made upon information or belief, or as matter of opinion, they must be regarded as designed to convey the impression that he had actual knowledge of their truth. *Bishop* v. *Davis*, 9 Hun, 342.

Suspicious circumstances of fraud, unexplained, held sufficient to sustain an order of arrest. *Wilmerding* v. *Cohen*, 8 Abb. Pr. N. S. 141.

Waiver of the fraud.— Although a debt was fraudulently contracted, yet if, subsequently thereto, plaintiff, with full knowledge of the fraud, settles the original debt and enters into a new contract upon additional consideration, defendant cannot be held to bail merely because the original debt was fraudulently contracted. *Merchants' Bank of New Haven* v. *Dwight*, 13 How. 366, 6 Duer, 659; *Nelson* v. *Blanchfield*, 54 Barb. 630.

In an action on a promissory note which became payable more than six years before the commencement of the action, but had been taken out of the statute of limitations by payments,— *Held*, that the plaintiff could not have an order of arrest for fraud in contracting the debt, as the payments kept alive the note only, not the fraud. *Fritts* v. *Slade*, 9 Hun, 145.

When an agent is liable to his principal in a fiduciary capacity, settles with him and gives his check and acceptance payable in the future, the character of his liability is changed from a wrong into a debt. *Alliance Ins. Co.* v. *Cleveland*, 14 How. 408.

But the fact that the creditor has accepted the note of his debtor for money received in a fiduciary capacity is no bar to an action on the original indebtedness upon the notes being returned. *Shipman* v. *Shafer*, 14 Abb. 449.

4. When the defendant has removed, concealed, or disposed of his property, or is about to do so, with the intent to defraud his creditors.

Notes to section 56, subdivision 4.

Concealing or removing property.— It must be shown that the removal or concealment was with intent that it should not be found or taken by the sheriff, or with the intent to deprive the plaintiff of it. *Watson* v. *McGuire*, 33 How. Pr. 87; *Gananique* v. *Du Luc*, 1 Abb. Pr. N. S. 419; *Muller* v. *Perrin*, 14 Abb. Pr. N. S. 95; *Barnett* v. *Selling*, 70 N. Y. 492, modifying 7 Hun, 236, 3 Abb. N. C. 83; *Nicholas* v. *Michael*, 23 N. Y. 264.

What is evidence of fraudulent disposal of property. See *Phillips* v. *Benedict*, 33 Barb. 655, 12 Abb. 355, affg. 20 How. 265.

An attempt to put the property beyond the reach of its owner will authorize the order of arrest. *Lippman* v. *Shapiro*, 19 Week. Dig. 504, 50 N. Y. Super. 370.

One codefendant admitted to the plaintiff that they had transferred their goods to another firm to keep them out of the hands of creditors, that it was the same as if they owned the goods; these admissions were

corroborated by suspicious circumstances, such as want of evidence of a good consideration for the transfer, the creation of a new firm to take the goods, the absence of any transfer of the premises in which the goods were situated, and the fact of their remaining on the same premises; an order of arrest on the ground of a fraudulent disposition of property was sustained. *Phillips* v. *Benedict*, 33 Barb. 355, s. c., 12 Abb. Pr. 355, 20 How. Pr. 265.

5. When an arrest is authorized by special statute, in an action for a fine or penalty, or for a wilful violation of duty.

6. When the action is for the recovery of a fine or penalty under the ordinances or by-laws of the city of New York.

§ 57. **Affidavit and undertaking upon granting.**— Before an order of arrest shall issue, the party applying must prove to the satisfaction of the court, by the affidavit of himself or some other person, the facts on which the application is founded, and the amount of his debt or claim over all payments and set-offs. The plaintiff must also execute and deliver to the clerk of the court, in the district in which the action is brought, a written undertaking approved by the court, with such approval endorsed thereon, with sufficient surety or sureties, to the effect that if the defendant recover judgment the plaintiff will pay to him all costs and extra costs that may be awarded to the defendant, and all damages which he may sustain by reason of the arrest not exceeding the sum specified in the undertaking, which must be double the amount claimed. But the proof and security required by this section shall not be necessary where the order of arrest is issued for the violation of a by-law or ordinance of the city of New York, or for the recovery of a penalty or a forfeiture under the statutes of this state, where the city of New York or any department of the government of said city authorized by statute to maintain an action, or of the people of the state of New York are plaintiffs.

Notes to section 57.

This section is substantially the same as section 1305 of the Consolidation Act (Laws 1882, chap. 410), which was taken from Laws

1857, chap. 344, § 21, leaving out the provision that an undertaking could be given without sureties. The party applying must now in all cases furnish a surety or sureties before an order of arrest is granted, except in the action to recover a penalty or forfeiture as specified at the close of this section. The form of the undertaking is different from that prescribed by section 812 of the Code of Civil Procedure, although that section applies to this court by section 3347, subdivision 6 of said Code.

Affidavit; what it must state.— The affidavit must be positive. Some of the material statements in the affidavits may be upon information and belief, but they must set forth the sources of the information and the grounds of the belief, the residence of the informants and reasons why their affidavits could not be obtained. *Jordon* v. *Harrison*, 13 Civ. Proc. Rep. 445. See also *Whitbeek* v. *Roth*, 5 How. Pr. 143; *Blason* v. *Bruno*, 33 Barb. 520; *De Weerth* v. *Feldner*, 16 Abb. Pr. 295; *De Nierth* v. *Lidner*, 25 How. Pr. 419; *City Bank* v. *Lumley*, 28 How. Pr. 397; *Potter* v. *Sullivan*, 16 Abb. Pr. 298; *Grimes* v. *Davison*, 2 Abb. N. C. 457; *Phelps* v. *Maxwell*, 2 Abb. N. C. 459.

In an action of replevin the affidavit stated that the defendant had concealed, removed, or disposed of the goods with intent to deprive the plaintiff of the benefit thereof, but the affidavit did not state that this had been done so the chattels "cannot be found or taken by the sheriff, and with intent that they should not be found or taken," etc. *Held*, that the order of arrest was improper. *Hough* v. *Folinsbee*, 36 N. Y. St. Rep. 708, 59 Hun, 148, 20 Civ. Proc. Rep. 111, 12 N. Y. Supp. 309, 13 N. Y. Supp. 221; *Markey* v. *Diamond*, 1 Misc. Rep. 97.

The intent must appear. *Muller* v. *Perrin*, 14 Abb. Pr. N. S. 95.

Amendment of undertaking.— See notes to § 3 ("Removal").

Complaint, when verified, is available as an affidavit, with others to sustain the order. *Palmer* v. *Hussey*, 59 N. Y. 647, affg. 65 Barb. 278.

Conversion of property.— What evidence sufficient to establish. *Woodbridge* v. *Nelson*, 13 Hun, 390.

Fraud.— Proof of an actual fraudulent intent is required. *Pacific Mutual Ins. Co.* v. *Machado*, 16 Abb. Pr. 451. And when it appears, a mere denial of any fraudulent intention will be disregarded. *City Bank* v. *Lumley*, 28 How. Pr. 397.

Intent must be inferred from acts and declarations. *Whitcomb* v. *Salsman*, 12 How. Pr. 533.

A purchaser who obtains credit by false representations must be held to intend the legitimate consequences of his acts. *Whitcomb* v. *Salsman*, 16 How. Pr. 533; *Smith* v. *Frank*, 2 Robt. 626.

Concealment of bankrupt condition. Representation. *Roebling* v. *Duncan*, 8 Hun, 502. The particular representations as to fraud, and in what respect they were false, must be stated. *Draper* v. *Beers*, 17 Abb. Pr. 163; *Thorpe* v. *Waddingham*, 3 Daly, 275.

Making a note; before maturity, a fire, obtaining the insurance, suddenly and secretly abandoning residence without notice, and removing to another State, unexplained. *Mallen* v. *Aznar*, 11 Abb. Pr. N. S. 223.

Exception to, and justification of, sureties.— By section 70 of this act sections 106 to 110 and sections 127 and 128 are made applicable to undertakings, sureties, and justification.

Goods on credit.— The facts to be disclosed, and an ample form to obtain an order of arrest for obtaining goods upon credit by false and fraudulent representation, can be found in *Wilmerding* v. *Cohen*, 8 Abb. Pr. N. S. 141. See also *Reid* v. *Martin*, 4 Hun, 590.

Mistakes, omissions, defects, and irregularities, and general rules respecting affidavits, bonds, and undertakings.— See notes to § 1, subd. 2.

Set-off.— An affidavit stating that plaintiff was entitled to recover of defendant a certain sum "over and above all discounts and set-offs," held sufficient. *Lampkin* v. *Douglas*, 15 Week. Dig. 314.

§ 58. **What to direct.**— An order of arrest, must direct that the summons accompanying it be made returnable immediately upon the arrest of the defendant, and it must specify a sum in which the defendant may be let to bail.

Notes to section 58.

This section is the same as section 1307 of the Consolidation Act (Laws 1882, chap. 410), which was taken from section 3218 of the Code of Civil Procedure.

As to the return day of the summons in other cases, see § 37.

§ 59. **Papers to be delivered to arrested person; proceedings thereupon.**— The marshal, upon arresting the defendant, by virtue of such an order, must at the same time, serve upon him the summons, and also a copy of the order of arrest, and of the papers upon which it was granted. He must forthwith bring the defendant before the court, in the district in which the action is brought, if the court is then in session; otherwise unless bail is given, as prescribed in section sixty-two of this act, he must take the defendant to the jail of the county in which the district where the action is brought is situate, for the confinement of prisoners in civil causes. The keeper thereof must confine the defendant therein. On the next day thereafter when said court is in session, the marshal must take the defendant from the jail and bring him before the court.

Note to section 59.

This section is substantially the same as section 1308 of the Consolidation Act (Laws 1882, chap. 410), with the exception of the addition of the words "of the county in which the district where the action is brought is situated," so as to make it consistent with the jurisdiction of the court in the four counties and the five boroughs of the city of New York.

§ 60. **Proceedings in case justice is a witness.**— If it be made to appear by the affidavit of the defendant to the satisfaction of the justice sitting in the district in which the action is brought, that such justice is a material witness in the action, the marshal must immediately take the defendant before the court in an adjoining district named by said justice, which must take cognizance of the action, and proceed therein the same as if the order of arrest had been issued out of the court in the latter district.

Note to section 60.

This section is substantially the same as section 1309 of the Consolidation Act (Laws 1882, chap. 410), and was formerly section 17 of chapter 344, Laws 1857. The reference to "District Courts" in the old section is omitted for the reason that there is only one court now, and the adjoining district to which the case may be sent is to be specified by the justice of the district in which the action was commenced.

§ 61. **Plaintiff to be notified of arrest.**— The marshal making the arrest must immediately give notice thereof to the plaintiff, and endorse on the order of arrest, and subscribe a certificate stating the time of serving the same, and of giving notice to the plaintiff.

Note to section 61.

This section is the same as section 1310 of the Consolidation Act (Laws 1882, chap. 410), and was formerly section 18 of chapter 344 of the Laws of 1857.

§ 62. **Bail or deposit before return.**— The defendant may give bail, by delivering to the marshal a written undertak-

ing to the plaintiff, in the sum specified in the order of arrest, executed by one or more sureties, to the effect that the defendant will attend in person at the opening of the court, on the next day thereafter when it is there in session, or he may deposit with the marshal the sum specified in the order of arrest. In either case the marshal must forthwith release him from custody.

Notes to section 62.

This section is the same as section 1311 of the Consolidation Act (Laws 1882, chap. 410), which is substantially section 3180 of the Code of Civil Procedure embraced in section 3218 of said Code.

Agreement with sureties for deposit with trust company.— It shall be lawful for any party of whom a bond or undertaking is required, to agree with his sureties for the deposit of any or all moneys for which such sureties are or may be held responsible with a trust company authorized by law to receive deposits, if such deposit is otherwise proper, and for the safe-keeping of any or all other depositable assets for which such sureties may be held responsible, with a safe deposit company authorized by law to do business as such, in such a manner as to prevent the withdrawal of such moneys and assets, or any part thereof, except with the written consent of such sureties, or an order of the court made on such notice to them, as it may direct. Part of § 813 of the Code Civ. Proc.

§ 63. **Bail may be examined.**—Where bail is given as prescribed in the last section, the officer taking the acknowledgment of the undertaking must, if the marshal so requires, examine under oath, to a reasonable extent, the persons offering to become bail, concerning their property and their circumstances. The defendant may give bail, or make the deposit, immediately upon his arrest, at any hour of the day or night; and he must have reasonable opportunity to seek for and procure, bail, before being committed to jail. Where a deposit is made, the money deposited must, before the expiration of the next day, thereafter, not being Sunday or a public holiday, be paid by the marshal into court, by paying the same directly to the clerk in the district in which the action is brought, which said deposit shall be regarded as an undertaking, and shall have the same force and effect and no other.

Note to section 63.

This section is substantially the same as section 1312 of the Consolidation Act (Laws 1882, chap. 410), with the exception that where a deposit is made, the marshal must pay the money to the *clerk* of the court instead of to the chamberlain. Section 1312 was substantially section 3181 of the Code of Civil Procedure and was made applicable by section 3218 of said Code.

§ 64. **Bail or deposit after return.**—At any time after the return of the marshal, and before final judgment, the court may admit a defendant in custody to bail, or allow him to make a deposit; and may direct his release upon his giving bail or making the deposit accordingly. The sum to be deposited or the sum specified in the undertaking of the bail, must be fixed, and the sureties in the undertaking must be approved by the court, which must be satisfied by their examination, or by other proof, respecting their sufficiency. The undertaking must be to the effect that the defendant will at all times, render himself amenable to any mandate which may be issued, to enforce a final judgment against him in the action.

Notes to section 64.

This section is substantially the same as section 1313 of the Consolidation Act (Laws 1882, chap. 410), which was substantially the same as section 3182 of the Code of Civil Procedure made applicable by section 3218 of said Code.

Abandonment bonds.—The court has the same power as to requiring further security, or committing defendant in default thereof, as is conferred by law upon judges of courts of record in similar cases. See § 178.

§ 65. **When and how defendant to remain in custody.**—Unless bail is given, or a deposit is made, as prescribed in the last three sections, the defendant must remain in the jail by virtue of the order of arrest, until final judgment in the action; and if the judgment is against the defendant, until the return of an execution against property issued thereupon. But the court must direct him to be brought into court, at the time of the trial; and it may in its discretion, direct him to be brought into court at any other time. In

either case he must be taken from the jail, and brought into court accordingly. Nothing in this section shall be so construed as to prevent a defendant at any time after judgment from being admitted to the jail liberties in the manner provided by law, whether formal execution against the person has issued or not.

Note to section 65.

This section is the same as section 1314 of the Consolidation Act (Laws 1882, chap. 410), with the exception of the addition commencing from the words "nothing in this section," etc., and is substantially section 3183 of the Code of Civil Procedure made applicable by section 3218 of said Code.

§ 66. **Duty of marshal.**— The marshal making the arrest, or another marshal, by direction of the court, must keep the defendant in custody, unless he shall give the security for his appearance, or until he is duly discharged by order of the court; but in no case can such detention exceed forty-eight hours, excluding Sundays and legal holidays, from the time of his first being brought before the court, unless within that time the trial of the action be commenced, and formally proceeded with, and resumed without any interruption other than the necessary recess of the court.

Note to section 66.

This section, together with the next section, is taken from sections 1315 and 1363 of the Consolidation Act (Laws 1882, chap. 410), which were taken respectively from Laws 1857, chap. 344, §§ 19, 26.

§ 67. **Undertaking by arrested defendant on applying for adjournment.**— If the defendant make application for an adjournment, or demand a jury trial at the time he is brought before the court, before it can be granted, he must, unless he has given bail or made a deposit, execute an undertaking, with one or more sufficient sureties, to be approved by the court, which approval must be indorsed on the undertaking, to the effect that he will appear on the adjourned day, and not depart until duly discharged according to law,

or until after the trial and judgment, and that he will surrender himself into custody if any execution be issued upon the judgment when obtained against him in the action.

Note to section 67.

See § 193 and notes to § 66.

§ 68. **Motion to discharge from arrest.**— A defendant, arrested as prescribed in this article, may, without notice, upon the appearance of the plaintiff before the court, or at any time afterwards before judgment, upon two days' notice given personally to the plaintiff, or to his agent or attorney who appeared for him before the court, apply to the court for an order, discharging him from arrest. The application may be founded upon the papers upon which the order of arrest was granted, and upon the complaint, if it has been made. The court must grant the application, where it appears that the case is not within the provisions of section fifty-six of this act. The court must also, upon the defendant's application, grant an order discharging him from arrest, if the plaintiff fails to take out an execution, upon a judgment in his favor, before the expiration of twenty-four hours after he is entitled thereto.

Notes to section 68.

This section is new and is substantially section 2901 of the Code of Civil Procedure, relating to "Courts of justices of the peace." Section 1315 of the Consolidation Act (Laws 1882, chap. 410), provided for the discharge of the defendant *by order of the court* in a general way.

Belief.— If the defendant believes his representations which he makes as to his liability to pay, before or at the time he purchases goods of the plaintiff, are true when he makes them, he is not guilty of any fraud, however false they may be in fact. *Gafney* v. *Burton*, 12 How. Pr. 516.

An affidavit is good although the applicant swears only to his belief as to the intent of fraud, provided he sets forth, on his positive oath, facts and circumstances on which such belief is founded. *Fullan* v. *Heaton*, 1 Barb. 552.

Chattels, concealment of.—The intent must appear by the facts stated. *Muller* v. *Perrin*, 14 Abb. Pr. N. S. 95.

It is not sufficient to show merely that the defendant removed it. The intent must appear that it should not be found, or taken by the marshal, so as to deprive plaintiff of it. *Watson* v. *McGuire*, 33 How. Pr. 87; *Jouanique* v. *De Luc*, 1 Abb. Pr. N. S. 419; *Muller* v. *Perrin*, 14 Abb. Pr. N. S. 95.

Christian names of plaintiffs must be stated on the papers on which the order of arrest was granted. Appearance by defendant waives the defect. 7 Cow. 366; *Ballowhey* v. *Cadot*, 3 Abb. Pr. N. S. 122.

The law does not recognize a single letter as a name. *Frank* v. *Levie*, 5 Robt. 599, 37 Barb. 479.

Copies of letters, documents, or papers, upon which information and belief is founded must be annexed. *De Weerth* v. *Feldner*, 16 Abb. Pr. 295; *De Nierth* v. *Sidner*, 25 How. Pr. 419.

Counter-affidavits.— Where the affidavits do not state facts within the plaintiff's own knowledge, and which, being uncontradicted, would establish *prima facie* the defendant's guilt, the order will be vacated upon contradictory affidavits by the defendant. *Sachs* v. *Bertrand*, 22 How. Pr. 95.

On being brought before the justice he may read counter-affidavits to those of the plaintiff and move thereon to discharge the arrest. This must be done before issue joined. *Johnson* v. *Florence*, 32 How. Pr. 230.

The defendant may elect whether he will informally demur to the plaintiff's case, set forth in the original affidavits, as *insufficient* to warrant the arrest, thus presenting the naked legal question on undisputed averments of fact, or whether he will open the merits of the whole controversy by moving on counter-affidavits, raising issues of fact, and proceed to an informal trial on the merits. But he cannot, in legal effect, pursue both methods at the same time, by selecting as the subject of denial and dispute such portions only of the plaintiff's case as he may deem most easily disproved, and thus debar the plaintiff from strengthening other portions by incontestable evidence, which on the original proof, perhaps, could hardly be sustained. The plaintiff, in such case, has the right to read additional affidavits which establish the fact in question beyond dispute. *Evans* v. *Holms*, 46 How. Pr. 515.

Counterclaim.— In an action to recover the value of chattels converted by defendant, it is not ground for discharging an order of arrest that the defendant has a claim for a larger amount against the plaintiff. *Hullet* v. *Reyns*, 1 Abb. Pr. N. S. 27.

Default in answer does not preclude motion to vacate.— The provisions allowing a verified complaint to be served, and providing that, unless a verified answer be filed, the justice must render judgment for the plaintiff without putting him to any proof, does not deprive this court of the power, upon default of a defendant to answer such

a complaint, to adjourn the cause for the purpose of hearing a motion to vacate an order of arrest. *Adler et al.* v. *Keiner*, 13 Daly, 60; s. c., 21 Week. Dig. 484, limiting *Ahrens* v. *Burke*, 63 How. Pr. 50.

Defective copies served.— That the copy of the affidavit served with the order of arrest does not purport to have been duly signed or verified is no ground for discharging the defendant from custody. *Barker* v. *Cook*, 16 Abb. Pr. 83; s. e., less fully, 25 How. Pr. 190, and 40 Barb. 254; *Bank of Havana* v. *Moore*, 5 Hun, 624.

An order of arrest will not be vacated because the copies of the papers served did not contain a jurat or verification, if the original papers were not defective. *Petschaft* v. *Lubow*, 27 Misc. Rep. 50.

Explanations.— Where the defendant has full opportunity to explain the allegations of the affidavits on which the order of arrest was granted, and has failed to do so, these allegations are to be taken most strongly against him. *Brooklyn Daily Union* v. *Hayward*, 11 Abb. Pr. N. S. 235.

Extension of time of payment of debt vacates a prior order of arrest. *Foxell* v. *Jones*, 11 Hun, 643.

Fiduciary capacity.— What is not, for which an arrest may issue, see *Buchanan F. O. Co.* v. *Woodman*, 1 Hun, 639; *Morange* v. *Woodman*, 6 Hun, 529.

Fraud.— Plaintiff must show affirmatively fraud, and where the evidence is equally consistent with guilt and innocence, the latter must prevail. *Stow* v. *Stacy*. 30 N. Y. St. Rep. 308.

There must be averments in the complaint of facts which constitute fraud, or the arrest will be set aside. *Lawrence* v. *Foxwell*, 4 Civ. Proc. Rep. 340.

Fraud merely constructive and not involving moral guilt is not ground of arrest. *Birchell* v. *Strauss*, 8 Abb. Pr. 53.

Where there is no evidence of actual fraud in the debtor, he should not be subjected to arrest for acts only constructively fraudulent. *People* v. *Kelly*, 35 Barb. 444.

All the items, and not some of them only, must be covered by the fraud. *Toffey* v. *Williams*, 5 Sup. Ct. (T. & C.) 294; *Ely* v. *Steigler*, 9 Abb. Pr. N. S. 35.

A general allegation as to the falsity of representations in an action for fraud is not enough. Particulars of the representation and falsity must be given. *Draper* v. *Beers*, 17 Abb. Pr. 163; *Thorp* v. *Waddingham*, 3 Daly, 275.

When inferences and conclusions are given. *Crandall* v. *Bryan*, 15 How. Pr. 48.

Arrest cannot be obtained in an action on a note on the ground that the debt for which the note was given was fraudulently incurred; where the claim arising from the fraud was perpetrated over six years before the action was commenced, the fraud was barred by the statute

of limitation, and payments on the note kept alive the note alone, and not the fraud. *Fritts* v. *Slade*, 9 Hun, 145.

The plaintiff may sustain the order and resist the motion by proving other contemporaneous frauds by the defendant. *Scott* v. *Williams*, 23 How. Pr. 393, 14 Abb. Pr. 70.

Goods stolen.— A written complaint alleged that certain goods had been stolen, and there was probable cause to suspect, and does suspect that Frank Blodgett stole them, is insufficient. *Blodgett* v. *Race*, 18 Hun, 132.

Identity of grounds of order of arrest with cause of action.— The merits of the action cannot be tried on affidavits, though the defendant cannot obtain bail, unless it is clear plaintiff will fail upon the trial in his proofs of the facts charged. *Royal Ins. Co.* v. *Noble*, 4 Abb. Pr. N. S. 54; *Swift* v. *Wylie*, 5 Robt. 680; *Faris* v. *Peck*, 10 Abb. Pr. N. S. 55; *City* v. *Mumford*, 47 Barb. 629; *Tallman* v. *Whitney*, 5 Daly, 505; *Griswold* v. *Sweet*, 49 How. Pr. 171; *Hoy* v. *Duncan*, 33 N. Y. Super. (1 J. & S.) 555.

The right to apply on motion for a discharge from arrest is secured to all persons who may be arrested under orders in civil actions. A defendant may, at any time before judgment, secure his liberation from arrest and imprisonment, upon proof of that right, whether the fact, out of which the liability to arrest is alleged to arise, form part of the cause of action itself or not. *Liddell* v. *Paton*, 7 Hun, 195.

Where the cause of action set forth in the complaint and the ground of arrest are the same, the controversy should be left to an investigation at a regular trial, and should not be decided upon conflicting affidavits on a motion to vacate the order of arrest. *Welch* v. *Winterburn*, 14 Hun, 519; *Merritt* v. *Carpenter*, 3 Keyes, 142.

Motion to vacate.— Although th cause of arrest be identical with the cause of action, it is required, on a motion to vacate the order, to examine the affidavits and decide the motion upon the fair preponderance of proof. *Argrave* v. *Blackman*, 25 Misc. Rep. 654, 28 Civ. Proc. Rep. 362.

Vacating order.— An allegation of fraud in contracting the debt sued for must be tried as an issue in the action, and an order of arrest therein will not be vacated on conflicting affidavits in reference to it. *Richen* v. *Franeis*, 29 Misc. Rep. 676.

A motion to vacate an order of arrest, though the grounds on which it was granted are identical with those stated in the complaint as affording a cause of action, may be granted, leaving plaintiff to try his case and, if successful, enforce judgment by body execution. *Stromberg* v. *Maister*, 34 Misc. Rep. 810.

Identical money.— Complaint alleged defendants were auctioneers, and as such "sold and delivered, for account of plaintiff, divers pieces of furniture," that they "received for the account and benefit of the plaintiff, in their capacity of auctioneers, the sum of $271.18, and there

remains due and owing from defendants to plaintiff the sum of $210.67, with interest from April 26, 1872, which sum hath been often demanded but refused." *Held*, that it did not appear from the complaint that it was the duty of the defendant to pay over the identical money received, but simply that he had received a certain sum of money on account of plaintiff, which he could pay with any funds, subject to his use and control. The identical money must appear to be property of the creditor. *Morange* v. *Waldron*, 6 Hun, 529. See also *Buchanan F. O. Co.* v. *Woodman*, 1 Hun, 639.

Inconsistency.— Where the affidavit is inconsistent with the complaint in facts, the arrest will be vacated. *Wicke* v. *Harmon*, 21 How. Pr. 462; s. c., 12 Abb. Pr. 476.

Information and belief.— Where the facts alleged are stated upon information and belief merely, and the sources thereof and grounds of belief are not given. *Satow* v. *Reisenberger*, 25 How. Pr. 164; *Markey* v. *Diamond*, 1 Misc. Rep. 97; *De Nierth* v. *Sidner*, 25 How. Pr. 419.

Copies of letters, documents, or papers, upon which information and belief is founded, should be furnished. *Weerth* v. *Feldner*, 11 Abb. Pr. 295; *De Nierth* v. *Sidner*, 25 How. Pr. 419.

Items.— All the items must be covered by the fraud, and not some of them only. *Toffey* v. *Williams*, 5 Sup. Ct. (T. & C.) 294. See also *Ely* v. *Steigler*, 9 Abb. Pr. N. S. 35; *Madge* v. *Ping*, 71 N. Y. 608; *Bassett* v. *Pitts*, 15 Hun, 464.

Irregularities.— An order of arrest will not be set aside for failure to file the undertaking, nor because it was a second order in the same cause, unless the moving papers specify these as irregularities. *Dickerhoff* v. *Ahlborn*, 2 Abb. N. C. 372.

Where a plaintiff unites in his complaint two causes of action, one of which is bailable and the other not, he waives his right to bail as to both, and an order of arrest cannot be sustained. *Madge* v. *Ping*, 71 N. Y. 608, revg. s. c., 12 Hun, 15.

Joining other claim.— Where one indebted in a fiduciary capacity gives a check which was protested for nonpayment, it is no objection to vacate the arrest that the complaint also demands the costs of protest, they not being claimed as a separate cause of action. *Shipman* v. *Shafer*, 14 Abb. Pr. 449.

Jurisdiction.— Where an action for wrongful injury to personal property is commenced by the service of a summons, accompanied by an order of arrest, jurisdiction does not depend upon the sufficiency of the affidavit upon which the order of arrest was made, but upon the service of the summons, and it still remains though the order be set aside as improperly granted. *McNeary* v. *Chase*, 30 Hun, 491.

Motion, when it can be made.— A defendant cannot move for an order to discharge him from arrest, before he has been actually arrested by

the officer, and served with the papers. *Thern* v. *Rackow*, 44 How. Pr. 443.

New grounds of arrest cannot be used to resist motion to vacate. *Chambers* v. *Durand*, 33 N. Y. Super. (1 J. & S.) 193.

Order of arrest, statements in.— A statement in an order of arrest that the ground therefor "is the conversion of money embezzled or fraudulently misapplied by said defendant in the course of his employment as attorney," does not make the order defective as being in the alternative, since it is merely a definition of the offense in equivalent terms. *Quail* v. *Nelson*, 39 App. Div. 18; *Blank* v. *Nelson*, 39 App. Div. 21.

Privileged from arrest.— See next section and notes.

Second arrest.—When a defendant has been discharged from imprisonment, by due course of law, he ought not to be rearrested, for the same cause, though in a different form of action. *Wright* v. *Litterman*, 4 Robt. 704; s. c., 1 Abb. Pr. N. S. 428. See also *Enoch* v. *Ernst*, 21 How. Pr. 96.

Settlement after the fraud will, upon motion, be cause to vacate the arrest. *Nelson* v. *Blanchfield*, 54 Barb. 630.

Principal's right to arrest factor barred by receiving notes for claim. *Trunninger* v. *Busch*, 7 Daly, 124.

Waiver.— In an action commenced by a warrant of arrest, issued on affidavits showing a ground of arrest extrinsic of the cause of action, if the defendant does not move to vacate the order of arrest, he admits that the warrant was rightly issued. *Coles* v. *Hannigan*, 8 Daly, 43.

§ 69. **Privilege from arrest.**— This article does not abridge or otherwise affect a privilege from arrest given by law, or a right of action for the breach thereof. A privileged person is entitled to be discharged from arrest, by the order of the court before which he is brought, upon proof, by affidavit, of the facts entitling him to a discharge; or he may apply for and obtain an order for his discharge, as prescribed in section five hundred and sixty-four of the code of civil procedure.

Notes to section 69.

This section is new, and is applied from section 2904 of the Code of Civil Procedure relative to justices' courts.

General provision as to privileges from arrest; discharge of privileged person.— Section 564 of the Code of Civil Procedure, referred to in this section, is as follows: "This title does not abridge or affect a privilege from arrest given by law, or a right of action for a breach thereof. A privileged person is entitled to be discharged from arrest where other provision is not made therefor by law, by the court, or a judge thereof. * * * The order must be made upon proof, by affidavit,

of the facts entitling the applicant to the discharge; and the arrest and discharge are not a bar to a new arrest, after the privilege has ceased. The court or judge may make the order without notice, or may require notice to be given to the sheriff (marshal) or to the plaintiff, or to both."

Attorney or counselor is privileged from arrest when "he is employed in a cause to be heard at that term." § 565, Code Civ. Proc.

Election day.— It is not a ground for setting aside an order of arrest that the party had been arrested previously in the same suit, and on the same process, on a day of general election. The exemption from arrest expires with the day of election, and the parties afterward stand toward each other as if no previous arrest had been made. 14 Johns. 346, 1 Wend. 32, 5 Wend. 90; *Petrie* v. *Fitzgerald*, 1 Daly, 401. See also *People* v. *Tweed*, 63 N. Y. 202, confirming 5 Hun, 382; *Young* v. *Weeks*, 7 Daly, 115.

Exemption.— Defendant was arrested in the street, near the court room, but before the court commenced its session. He had gone to attend either the trial or proceedings for the removal of the cause to another court, upon justification of sureties, and when arrested was leaving to go home, because he thought nothing would be done. *Held*, that he was entitled to go to ascertain if anything would be done in the action, and to return unmolested, and that merely stopping to announce to the counsel for the opposite party that no steps would be taken was not such a deviation from his journey as justified his arrest. *Salhinger* v. *Alder*, 2 Robt. 704.

The exemption of the party or witness from the arrest is a personal privilege which can be waived, and the waiver is complete where the party or witness fails to claim it at once, and does some act in the cause in reference to his appearance, such as perfecting bail, by justification of the sureties. 8 Abb. Pr. 416, 15 Barb. 26, 7 Cow. 366, 5 How. Pr. 233, 4 Hill, 59; *Petrie* v. *Fitzgerald*, 1 Daly, 401; *Mackey* v. *Lewis*, 7 Hun. 83.

§ 70. **Sections applicable as to undertakings, et cetera.**— Sections one hundred and six to one hundred and ten of this revision inclusive and sections one hundred and twenty-seven and one hundred and twenty-eight, in so far as they relate to undertakings, sureties and justification, apply to proceedings under this title, and the exceptions to, and examination of, sureties, whether on undertaking, or bail, may be made and conducted, by the adverse party, as prescribed therein.

Note to section 70.

This section is new. See also § 92.

NOTE.— There are no sections 71 and 72.

ARTICLE II.

Attachment.

SECTION 73. When may be granted.
74. What must be shown to procure warrant.
75. Contents of warrant
76. Undertaking.
77. How warrant to be executed.
78. Attachment, how levied.
79. Certificate of defendant's interest to be furnished.
80. Person refusing certificate may be examined.
81. Marshal may maintain action.
82. When attachment discharged, et cetera. Property to be restored to defendant.
83. Service of summons and warrant of defendant.
84. Undertaking of defendant.
85. Claim by third person; bond and delivery thereupon.
86. Judgment upon bond.
87. Action upon undertaking where warrant is vacated.
88. Return by marshal attaching.
89. Application to vacate or modify warrant of attachment.
90. Effect of vacating warrant.
91. Judgment where property has been attached.
92. Sections applicable as to undertaking, et cetera.

§ 73. **Attachment, when may be granted.**— A warrant of attachment against the property of one or more defendants must be granted, upon the application of the plaintiff, as hereinafter prescribed, in an action upon one or more of the following causes of action:

1. Upon a judgment.
2. Breach of a contract, express or implied.
3. Wrongful conversion of personal property.
4. Any other injury to personal property, in consequence of negligence, fraud or misconduct.

Notes to section 73.

This section is substantially the same as section 1316 of the Consolidation Act (Laws 1882, chap. 410), with the exception of subdivision 1, "Upon a judgment," which has been added.

Fictitious names; no authority to grant attachments on.— This court has no authority, and never had, to grant attachments against

persons by fictitious names. *McCabe* v. *Doe*, 2 E. D. Smith, 64; *Gardner* v. *McKraft*, Daily Reg., Feb. 23, 1877; *Davenport* v. *Doady*, 3 Abb. Pr. 409; *Solinger* v. *Patrick*, 9 Daly, 151.

Not a matter of right.— An attachment cannot be demanded as a matter of right, and whether in a particular case it should issue is within the discretion of the court; an order therefore refusing the writ is not reviewable. *Sartwell* v. *Field*, 68 N. Y. 341.

§ 74. **What must be shown to procure warrant.**— To entitle the plaintiff to such a warrant, he must show, by affidavit, to the satisfaction of the court, as follows:

Note to section 74.

This section is taken from section 1317 of the Consolidation Act (Laws 1882, chap. 410), which was the same as section 2906 of the Code of Civil Procedure. Subdivision 2 of this section has been changed so that the departure referred to in subdivision 2 of section 1317 is now to places without the limits of the city of New York as now constituted under the Charter (Laws 1897, chap. 378, as amended in 1901), which includes four counties and five boroughs.

1. That a sufficient cause of action exists against the defendant to recover damages for one or more causes specified in the last section. If the action is upon a judgment, or to recover for breach of a contract, the affidavit must show that the plaintiff is entitled to recover a sum stated therein, over and above all counterclaims known to him.

Notes to section 74, subdivision 1.

Affidavit, requisites of.— It is the uniform practice of the courts in reviewing proceedings had, if possible, to sustain them by every reasonable and warrantable intendment. The creditor is not required to furnish conclusive evidence of the facts relied on. It is sufficient if the proof has a legal tendency to make out, in all its parts, a case for the issuing of the attachment; and if the facts and circumstances disclosed fairly call for the exercise of judgment, the proceedings are not void. To defeat jurisdiction it must be made to appear that there is a total want of evidence upon some particular point. The rule is the same whether the question arises in a direct or in a collateral proceeding. *Schoonmaker* v. *Spencer*, 54 N. Y. 366.

Amount due must be shown by facts.— The statutes giving jurisdiction must be strictly followed, or jurisdiction will not be acquired.

An affidavit stating only that the defendant is indebted to the attaching creditor in a sum named, "over and above all discounts," is insufficient to sustain the process, and both that and all subsequent proceedings are without jurisdiction. *Solinger* v. *Patrick*, 7 Daly, 408, 48 Barb. 68. See also *Riley* v. *Skidmore*, 6 N. Y. Supp. 107.

When the affidavit alleges that there is a large sum of money due from the defendant, but omits to specify the amount of the claim, it will be insufficient. *Ackroyd* v. *Ackroyd*, 20 How. Pr. 93; s. c., 11 Abb. Pr. 345.

An averment "that deponent will allege in his complaint herein" is insufficient. *Axford* v. *Seguine*, 70 App. Div. 228.

The affidavit must state facts showing, presumptively at least, that the amount claimed is owing to plaintiff, and it is not enough merely to state that the amount is due to him. *McLoughlin* v. *Naugle*, 34 Misc. Rep. 385.

In an affidavit to procure an attachment, it is not absolutely necessary for plaintiff to adopt the words of the statute in order to show the right of recovery, and the facts required are sufficiently stated by the words, "Defendants are justly indebted to him in the sum of $511.31 over all set-offs or counterclaims that said defendants might have against this plaintiff to his knowledge." *Richerson* v. *Bunker*, 26 Misc. Rep. 383.

In an affidavit for an attachment, where the damages are unliquidated, it is necessary to set out the facts which the plaintiff claims prove the damage, in order that the court may determine whether any damage has been sustained. *James* v. *Signell*, 60 App. Div. 75.

To sustain an attachment in an action on contract, the specific sum due must be established by proof, not merely averred, and if plaintiff, by adopting the wrong measure of damages, claims too much, the attachment must be set aside. *Smith* v. *Swenson*, 26 Misc. Rep. 151.

Belief.— The facts upon which belief is founded must be stated. *Camps* v. *Tibbets*, 2 E. D. Smith, 20; *Fulton* v. *Heaton*, 1 Barb. 552; *Smith* v. *Lucc*, 14 Wend. 237, 20 Wend. 77, 145; *Stewart* v. *Brown*, 16 Barb. 367.

An affidavit in which facts are stated upon belief only is fatally defective. *Dewey* v. *Greene*, 4 Den. 93; *Mott* v. *Lawrence*, 9 Abb. 196, 17 How. 559.

An affidavit made on information derived from a person not named, and not under oath, without any explanation of the reason why the affidavit of such person is not procured, or more reliable testimony obtained, is not sufficient. Information from third parties may be sufficient, where the source and nature of the information are set forth with such particularity and certainty that defendant can easily contradict it if it is untrue, and the plaintiff's inability to procure their affidavits is shown. *Greene* v. *Gonzales*, 2 Daly, 412.

The affidavit is defective where the important allegations are all upon information and belief, the source of information being said to be contained in affidavits on file in the court, when the affidavits referred to are not quoted from, nor are their contents nor any portion of them stated. *Selser Bros. Co.* v. *Potter Produce Co.*, 77 Hun, 313. See also *Sizer* v. *Hampton, etc.*, 67 App. Div. 547.

The omission to state in the affidavit, made upon information and belief, the names of the informants, and to excuse the failure to file their affidavits, is a fatal defect, and calls for vacating the attachment. *Acker, Merrall & Condit* v. *Saynisch*, 25 Misc. Rep. 415, affg. 26 Misc. Rep. 836.

It is not necessary, in order to give jurisdiction to issue an attachment, that the affidavit should state specifically that a summons has been issued or served; a statement that an action has been commenced is sufficient. *Wallace* v. *Castle*, 68 N. Y. 370.

Before service of summons.— An attachment can be allowed, issued, and served before the service of the summons is completed. *Corson* v. *Ball*, 47 Barb. 452.

To authorize the issuing of an attachment it is not necessary that a summons shall have been served; for that purpose, "an action shall be deemed commenced when the summons is issued." *Wallace* v. *Castle*, 68 N. Y. 370. See also § 30, *ante*.

Cause of action.— Where an affidavit, upon an application for an attachment, alleges that "the defendants are indebted to us, the plaintiff, in the sum of $3,260.85, for goods sold and delivered, for which they have promised but failed to pay," it sufficiently states a cause of action. If the goods were not payable on delivery, but were sold on credit, it rests upon the defendant to show such to be the case; it is not necessary for the plaintiff to deny that it is so in his affidavit. *Kiefer* v. *Webster*, 6 Hun, 526.

2. That the defendant is either a foreign corporation, or not a resident of the state; or, if the defendant is a natural person, and a resident of the state, that he has departed, or is about to depart from the county where he last resided, to a place outside the city of New York, with intent to defraud his creditors, or to avoid the service of a summons, or keeps himself concealed, with the like intent; or if the defendant is a natural person, or a domestic corporation, that he or it has removed, or is about to remove property from the county where the defendant, being a natural person, last resided, or being a corporation, has kept its principal office, to a place outside of the city of New York, with intent to de-

fraud his or its creditors, or has assigned, disposed of, or secreted, or is about to assign, dispose of, or secrete property, with the like intent; or where for the purpose of procuring credit or the extension of credit, the defendant has made a false statement in writing, under his own hand and signature, or under the hand and signature of a duly authorized agent, made with his knowledge and acquiescence, as to his financial responsibility or standing. Or that the defendant being a natural person of full age, and a resident of the state, has been continuously without the United States for the space of six months or more, immediately before the application and either that he has not made a designation of a person upon whom to serve a summons in his behalf as prescribed in section four hundred and thirty of the code of civil procedure, or that service upon the person so designated cannot be made, with due diligence, in the county where the person making the designation resides. The affidavit must be filed in the office of the clerk of the court, in the district in which the action is brought when the warrant is issued.

Notes to section 74, subdivision 2.

Concealment.— Where the essential statutory fact to be shown was concealment with intent to avoid service of a summons,— *Held,* that affidavits alleging absence of the defendant from his usual place of business and resort soon after the debt had been demanded of him, coupled with his refusal, when asked by plaintiff, to give his address or residence, contained enough to fairly call upon the magistrate for the exercise of his judgment upon the evidence. *Easton* v. *Malavazi,* 7 Daly, 147.

A removal, or concealment, of himself by defendant, with intent to avoid the service of a summons, is a sufficient ground for an attachment, and it is not necessary to show that the concealment was for the express purpose of avoiding service in the present action. *Finn* v. *Mehrbach,* 30 Civ. Proc. Rep. 242, 65 N. Y. Supp. 250.

Departure.— An affidavit which states positively in the language of the statute the single fact that the defendant had departed from the county with intent to defraud his creditors, or had departed from the county, standing alone, unaided by any other fact or circumstance, is not legal evidence of a departure from the county with intent to defraud his creditors. *Furman* v. *Walter,* 13 How. Pr. 348; *Stewart* v. *Brunn,* 16 Barb. 367.

Affidavits in support of an attachment, issued on the ground that defendant "has departed from this State to England with intent to defraud his creditors, or to avoid the service of a summons in this action," — *Held* insufficient. *Ringler Co.* v. *Newman*, 33 Misc. Rep. 653.

Allegations concerning the absence of defendant from his office and his home, and of unsuccessful attempts to reach him,— *Held* sufficient to show fraudulent intent as to creditors. *Stewart* v. *Lyman*, 62 App. Div. 182.

Designation, by a resident, of a person upon whom to serve a summons during his absence; effect and revocation thereof.—Section 430 of the Code of Civil Procedure, mentioned in section 74 of this act, was made applicable, because of the frequent protracted absence of residents abroad, and is as follows:

§ 430. A resident of the State, of full age, may execute, under his hand, and acknowledge, in the manner required by law to entitle a deed to be recorded, a written designation of another resident of the State, as a person upon whom to serve a summons, or any process or other paper for the commencement of a civil special proceeding, in any court or before any officer, during the absence from the State of New York of the person making the designation; and may file the same, with the written consent of the person so designated, executed and acknowledged in the same manner, in the office of the clerk of the county where the person making the designation resides. The designation must specify the occupation, or other proper addition, and the residence of the person making it, and also of the person designated; and it remains in force during the period specified therein, if any; or, if no period is specified for that purpose, for three years after the filing thereof. But it is revoked earlier, by the death or legal incompetency of either of the parties thereto; or by the filing of a revocation thereof, or of the consent, executed and acknowledged in like manner. The clerk must file and record such a designation, consent or revocation; and must note, upon the record of the original designation, the filing and recording of a revocation. While the designation remains in force as prescribed in this section, a summons, or any process or other paper for the commencement of a civil special proceeding, against the person making it, in any court or before any officer, may be served upon the person so designated, in like manner and with like effect, as if it was served personally upon the person making the designation, notwithstanding the return of the latter to the State of New York.

Evidence of intent.— The affidavit stated that the defendant was about to dispose of his property with intent to defraud his creditors; that defendant left the country two months before and went to Canada with intent to remain there, taking with him portions of his goods; that

he had no family and but little property; that he was offering his property for sale; that he had told the plaintiff he would be glad if he ever got his pay of him; that no civil process could be served on him because he kept out of the State, and that he refused to pay anything on plaintiff's debt. *Held*, that these facts showed a strong case of intent to dispose of property to defraud creditors. *Rosenfield* v. *Howard*, 15 Barb. 546.

Where the defendant, when called upon by plaintiff upon several occasions, to pay the amount of his demand, put it off, stating that her husband every night took all the money which she had obtained during the day, and paid it to persons in the city of New York from whom she had purchased goods, and when the payment to such persons was disproved by affidavit, no other inference could be drawn by the court than that such disposition of the defendant's money was made with intent to defraud, and that it was a proper case for an attachment. *Anderson* v. *O'Reilly*, 54 Barb. 620.

The affidavit, upon the ground of fraud, alleged the facts constituting fraud, upon information and belief, and one of the affiants averred that he stated to defendant the facts, that defendant did not deny them, but promised to immediately call and settle or give security. *Held* sufficient evidence of fraud to warrant the attachment. *Blake* v. *Bernhard*, 6 N. Y. Super. 74. See also the cases of *Bump* v. *Daheny*, 36 N. Y. St. Rep. 114, 12 N. Y. Supp. 901; *Pattison* v. *Delaney*, 20 Civ. Proc. Rep. 427.

Hearsay.— Statement as to defendant's departure from the country must be on information and belief. Hearsay is not enough. *Sickles* v. *Sullivan*, 5 Hun, 569; *Garrison* v. *Marshall*, 44 How. 193.

Nonresident.— In order to procure an attachment against a nonresident, the affidavit should state the facts and circumstances on which plaintiff relies to make out his cause of action, and these facts must be stated positively. *Wells* v. *Sisson*, 14 Hun, 267.

An affidavit which states that the plaintiff has a debt against the defendant, arising upon contract, and that the defendant is a nonresident of the county, is enough to warrant the justice in issuing an attachment. *Van Kirk* v. *Wilds*, 11 Barb. 520. See to the contrary, however, *Wells* v. *Sisson*, 14 Hun, 267.

An affidavit against a nonresident, for a tort, is sufficient in respect to the matter of residence, if it states that the plaintiff is a resident of the county, and that the defendant is not, but resides in another county. 10 Wend. 360, 13 Wend. 46, 14 Wend. 237, 20 Wend. 77, 1 Den. 592; *Pope* v. *Hart*, 35 Barb. 630; s. c., 23 How. Pr. 215; *Clews* v. *Rockland, etc., R. R. Co.*, 2 Hun, 379.

Upon an application on the ground of the nonresidence of the defendant, the affidavit is not required to state in positive terms that he is not a resident of the State. It is sufficient when that conclusion is

the only one which can be consistently drawn from the facts set forth in the affidavit. Domicile is the habitation fixed in any place with the intention of always staying there, while residence is much more temporary in its character. *The Mayor, etc., of New York City* v. *Genet*, 4 Hun, 487.

The fact that a debtor, who resides in another State, has a place of business within this State does not make him a resident here, so as to prevent the issuing of an attachment against him as a nonresident. *Tanner* v. *Church*, 1 Abb. 299, distinguished and disapproved; *Wallace & Sons* v. *Castle*, 68 N. Y. 370.

An affidavit for, against a foreign corporation, which states that the plaintiff resides in another State, but does not state that the cause of action arose in this State or that the contract sued on was made therein, is insufficient to confer jurisdiction on the court. *Allison* v. *Snider Preserve Co.*, 20 Misc. Rep. 367.

An attachment cannot issue out of this court upon the ground of the nonresidence of the defendant, unless he is a nonresident of the State of New York. Where he is merely a nonresident of the county of New York, the attachment is void, and therefore where he was not personally served, no judgment can be entered against him. *Diller* v. *Willis*, 34 Misc. Rep. 197.

Removal and disposing of property.— The affidavit must disclose the facts from which the legal and logical deduction would be that the defendant meant to remove property from the county with the fraudulent intent specified in the statute. *Mott* v. *Lawrence*, 9 Abb. Pr. 196.

The mere fact of defendant closing his store, and packing his goods until midnight, and the store being closed the next morning, his family having been removed for two days without his neighbors being informed of it, is not a necessary or presumptive legal conclusion that he meant to remove his property with intent of defrauding his creditors. *Mott* v. *Lawrence*, 17 How. Pr. 559, 9 Abb. Pr. 196, 5 Robt. 601.

Where the whole charge of "removing and disposing of property, and departing from the State, with intent to defraud creditors," rested upon the fact that the defendant offered to sell deponent goods for less than to any one else, and requested him to keep it a secret, it was held insufficient to procure an attachment. *Frank* v. *Levie*, 5 Robt. 599.

The facts that a debtor is insolvent; that he has turned over to two creditors portions of his goods amounting to less than one-half of their respective debts; that he refuses to turn over any goods to the plaintiffs or to pay the amount due to them; that he is selling off his stock in trade and not likely to continue his business, do not furnish sufficient evidence to authorize a justice of the peace to issue a warrant of attachment against him, on the ground that he has disposed or is about to dispose of his property with intent to defraud his creditors. *Horton* v. *Fancher*, 14 Hun, 172.

Allegations in affidavits that defendant was, to deponent's knowledge, about to remove her property from the United States with intent to defraud creditors; that she had threatened to him to sell all her property and "skip out" if the claims were pressed; that she had informed him that she would pay no debt whatever; with proof that she had advertised her business for sale as she was going to Europe, and would sell it and her wares at one-fourth their value,— *Held* sufficient to support an attachment. *Fox* v. *Mays*, 46 App. Div. 1, 61 N. Y. Supp. 295.

Threats.— Defendant, on being informed, after his refusal to pay a note, that he would be sued, threatened, if he was sued, "to turn over all his property, and that the plaintiff would not get a cent," there is good ground for granting an attachment. *Livermore* v. *Rhodes*, 27 How. Pr. 506; s. c., 3 Robt. 626; *Gasherie* v. *Apple*, 14 Abb. Pr. 64.

When the threat is "to make an assignment" simply, without any evidence to show fraudulent intent, an attachment will not issue. *Dickerson* v. *Benham*, 20 How. Pr. 343, affg. s. c., 19 How. Pr. 410; 10 Abb. Pr. 390; *Wilson* v. *Britton*, 26 Barb. 562; s. c., 6 Abb. Pr. 97, revg. s. c., 6 Abb. Pr. 33.

§ 75. **Contents of warrant.**— The warrant must be granted by the court at the time when the summons is issued, and must be issued by the clerk of the court in the district in which the action is brought, and it must be indorsed upon or annexed to the summons. It must be subscribed by the clerk, and must briefly recite the ground of the attachment. It must require the marshal, to whom the summons is delivered, to attach on or before a day specified therein, which must be at least six days before the return of the summons, and safely to keep, as much of the defendant's personal property, within the city of New York, as will satisfy the plaintiff's demand, with the costs and expenses and to make return of his proceedings thereon to the court, at the time when the summons is returnable. The amount of the plaintiff's demand must be specified in the warrant as stated in the affidavit. Nothing in this section shall be construed to prevent a valid warrant of attachment issuing in a proper case against a non-resident of the city of New York.

Notes to section 75.

This section is the same as section 1318 of the Consolidation Act (Laws 1882, chap. 410), with the exception that from the words

"Nothing in this section" down to the end thereof is new. This addition was necessitated by the cases of *Rosenthal* v. *Grouse*, 12 Daly, 529; reported also in 1 How. N. S. 447, and 7 Civ. Code Rep. 145, and *Sullivan* v. *Presdee*, 9 Daly, 552, where it was held, that this court did not have jurisdiction against a nonresident defendant, by reason of the short summons, which allowed a shorter period than six days in the return day of a summons in an action against a nonresident. The return day of six days in attachment cases caused the court in the cases above cited, because of the inconsistency of these "return days," to so decide, and it was for the purpose of removing all doubt on this troublesome and mixed question that the Legislature in this act omitted "Short summonses," and added the amendment herein referred to, as we say in our notes, to section 56 of this act, in referring to this same case, so we repeat here an account of the *cases omissus* in the law. This case of *Rosenthal* v. *Grouse*, *supra*, is well worth the attention of the student and of the practitioner to show how "fearfully and wonderfully laws are sometimes enacted." See also our notes in our Fourth Edition, page 189, etc., under section 1316 of the Consolidation Act, which notes were also contained in our Third Edition, published in 1894, but strange to say, the Legislature did not remedy the defect until the passage of the present act.

Amendment.— Warrant may be amended. *King* v. *King*, 68 App. Div. 189, 74 N. Y. Supp. (108 St. Rep.) 119.

Amount.— The amount of the plaintiff's demand must be specified in the warrant, as stated in the affidavit, and it must not be for a sum exceeding the justice's jurisdiction. *Mattison* v. *Bancus*, Hill & D. Supp. 321.

Nonresident.— See notes to § 74, subd. 2.

§ 76. **Undertaking.**—Before granting the warrant, the court must require a written undertaking to the defendant, on the part of the plaintiff, with one or more sureties, approved by the court, to the effect that, if the defendant recovers judgment, or the warrant of attachment is vacated, the plaintiff will pay all costs which may be awarded to the defendant, and all damages which he may sustain by reason of the attachment, not exceeding the sum specified in the undertaking, which must be at least twice the amount of the plaintiff's demand, as stated in the warrant, and in no case less than two hundred dollars, and that if the plaintiff recovers judgment, he will pay to the defendant all money received by him from property taken by virtue of the war-

rant of attachment, or upon any bond given therefor, over and above the amount of the judgment and interest thereupon.

Notes to section 76.

This section is substantially the same as section 1319 of the Consolidation Act (Laws 1882, chap. 410), except as to the amount of the undertaking, which is similar to section 2908 of the Code of Civil Procedure, appertaining to justices' courts. Section 1319 of the Consolidation Act is taken from sections 2908 and 3219 of the Code of Civil Procedure "Requisites of certain undertakings," combined.

Amendment.— A justice of this court has power to allow an amendment of a defective undertaking on attachment. *Finn* v. *Mehrbach*, 30 Civ. Proc. Rep. 242, 65 N. Y. Supp. 250.

Amendment of undertaking can only be had with consent of the sureties. *Langley* v. *Warren*, 1 N. Y. 606; s. c., 3 How. Pr. 363, 1 Code Rep. 111; *Wilson* v. *Allen*, 3 How. Pr. 369. Consult however *Wood* v. *Kelly*, 2 Hilt. 334; *Irwin* v. *Muir*, 13 How. Pr. 409; s. c., 4 Abb. Pr. 133. See *Robinson* v. *Moran*, 23 Week. Dig. 326.

Amount of liability omitted.— An attachment in this court is not invalidated by the fact that the undertaking stated no maximum amount of liability, but left the amount in blank, as there is no provision of law forbidding sureties from binding themselves in an unlimited amount. *Tischler* v. *Fishman*, 34 Misc. Rep. 172.

Exception to, and justification of, sureties.— By section 70 of this act sections 106 to 110 and sections 127 and 128, relating to undertakings, sureties, and justifications, are made applicable.

Mistakes, omissions, defects, and irregularities, and general rules respecting affidavits, bonds, and undertakings.— Code of Civil Procedure, sections 728, 729, 730, and 810 to 816, relating to affidavits and undertakings, apply to this court by section 3347, subdivision 6 of said Code, making them applicable to *all* courts.

§ 77. **How warrant to be executed.**— The marshal to whom the warrant of attachment is delivered must execute it at least six days before the return day of the summons, by levying upon so much of the property of the defendant hereinafter mentioned, as will satisfy the plaintiff's demand with costs and expenses and must safely keep the same to be disposed of as prescribed in this title and must immediately make an inventory thereof stating therein the estimated value of each article or item. Such levy can be made on the following property:

1. Goods and chattels of the defendant found in the city of New York not exempt from levy and sale by virtue of an execution including money and bank notes.

2. The rights or shares which the defendant has in the stock of an association or corporation having a place of business in the city of New York, together with the interest and profits thereon, and the marshal's certificate of the sale thereof entitles the purchaser to the same rights and privileges, with respect thereto, which the defendant had, when they were so attached.

3. Causes of action arising upon contract, including bonds, promissory notes, or other instruments for the payment of money only, negotiable or otherwise, whether past due, or yet to become due, executed by a corporation, or by a private person, either within or without the state, which belong to the defendant, and are found within the city, and the levy of the attachment thereupon is deemed a levy upon, and a seizure and attachment of, the debt represented thereby.

Notes to section 77.

This section is taken from section 1320 of the Consolidation Act (Laws 1882, chap. 410). It was formerly the same as section 2909 of the Code of Civil Procedure.

Exempted property.— The exemption of articles from execution granted by Code of Civil Procedure, section 1390, is absolute. In the case of the further articles exempted by section 1391, "necessary household furniture, working tools and team, etc., not exceeding in value $250," the exemption is limited and indefinite and must be asserted. And if an officer levy upon the latter class of property under section 2909, Code of Civil Procedure, the debtor must claim the exemption and notify the officer thereof before he can maintain against such officer an action either for conversion or replevin. *Wilcox* v. *Howe*, 39 N. Y. St. Rep. 303, 12 N. Y. Supp. 783, 59 Hun, 270, 20 Civ. Proc. Rep. 214.

Where the warrant may be served or executed.— Section 9 of this act authorizes process to be served or executed anywhere in the greater "City of New York," which includes four counties and five boroughs.

§ 78. **Attachment, how levied.**— A levy under a warrant of attachment upon personal property capable of manual delivery, including a bond, a promissory note, or other instrument for the payment of money, must be made by taking

the same into the marshal's actual custody. He must thereupon, without delay, deliver to the person from whose possession the property is taken, if any, a copy of the warrant, and of the affidavits upon which it was granted. Upon other personal property, it must be made by leaving a certified copy of the warrant and a notice showing the property attached, with the person holding the same; or if it consists of a demand, other than as specified in this section with the person against whom it exists or, if it consists of rights or shares in the stock of an association or corporation, or interests or profits thereon, with the president, or other head of the association or corporation, or the secretary, cashier, or managing agent thereof.

Notes to section 78.

This section is taken from section 649 of the Code of Civil Procedure.

Incapable of manual delivery.— The proper course of proceeding in attaching property incapable of manual delivery, stated. *Mechanics & Traders' Bank of Jersey City* v. *Dakin*, 33 How. Pr. 316.

To make the levy of an attachment upon property incapable of manual delivery effectual, it is not necessary that the notice "showing the property levied on," required in such case by section 235 of the Code to be served with the certified copy of the warrant of attachment, should specify particularly the property or debts supposed to be in the possession of or owned by the individual served. A general notice by the sheriff that he attaches all property, debts, etc., belonging or owing to the defendant in the attachment suit, in the possession or under the control of the individual served, is sufficient. *O'Brien* v. *Mechanics & Traders' Fire Ins. Co.*, 56 N. Y. 52; s. c., 15 Abb. Pr. N. S. 222. And see *People* v. *St. Nicholas Bank Co.*, 44 App. Div. 316, 60 N. Y. Supp. 719.

Not sufficient property.— There is no abuse of process where the property attached is not sufficient to satisfy the execution. *Reily* v. *Skidmore*, 6 N. Y. Supp. 107.

Second attachment.— Where property was seized and removed by virtue of an attachment, the plaintiff, having been nonsuited on the trial, immediately sued out another attachment, upon which the officer who served the first seized the same property in his own possession, on the second attachment, and afterward sold it on the execution in that suit. *Held*, that defendants were entitled to show the appropriation of the property on the process in the second attachment suit in reduction of damages. *Earl* v. *Spooner*, 3 Den. 246. And see *Bennett*

v. *Brown*, 31 Barb. 158; affd., 20 N. Y. 99. See also *Still Stove Works* v. *Scott*, 62 App. Div. 566, 71 N. Y. Supp. 181.

§ 79. **Certificate of defendant's interest to be furnished.**— Upon the application of a marshal, holding a warrant of attachment, the president or other head of an association or corporation, or the secretary, cashier, or managing agent thereof, or a debtor of the defendant, or a person holding property, including a bond, promissory note, or other instrument for the payment of money, belonging to the defendant, must furnish to the marshal a certificate, under his hand, specifying the rights or number of shares of the defendant, in the stock of the association or corporation, with all dividends declared, or encumbrances thereon, or the amount, nature and description of the property, held for the benefit of the defendant, or of the defendant's interest in property so held, or of the debt or demand owing to the defendant, as the case requires.

Notes to section 79.

This section is taken from section 650 of the Code of Civil Procedure.

Effect of certificate; mistake.— Party giving certificate is not estopped from showing, in an action brought against him on the faith of such statement, that he was honestly mistaken in making it. *Almy* v. *Thurber*, 99 N. Y. 407.

§ 80. **Person refusing certificate may be examined.**— If a person, to whom application is made, and* prescribed in the last section, refuses to give such a certificate; or if it is made to appear by affidavit, to the satisfaction of the court, that there is reason to suspect that a certificate given by him is untrue, or that it fails fully to set forth the facts, required to be shown thereby, the court may make an order, directing him to attend, at a specified time, at the court in the district in which the action is brought, and submit to an examination, under oath, concerning the same.

* So in the original; should be "as."

Notes to section 80.

This section is substantially the same as section 651 of the Code of Civil Procedure, with the "referee" part thereof omitted, as this court has no power to order a reference.

Effect.— The proceeding provided for in this section is for the benefit of the creditor and sheriff, but they are not bound to resort to it, nor are they bound by the certificate if furnished. Refusal to give it does not suspend action on the attachment, nor prevent a levy until an examination is had. *O'Brien* v. *Mechanics & Tradcrs' Fire Ins. Co.*, 56 N. Y. 52.

§ 81. **Marshal may maintain action.**— The marshal must, subject to the direction of the court, collect and receive all debts, effects, and things in action attached by him. He may maintain any action or special proceeding in his own name or in the name of the defendant, which is necessary, for that purpose, or to reduce to his actual possession an article of personal property, capable of manual delivery, but of which he has been unable to obtain possession, and he may discontinue such an action or special proceeding, at such time and on such terms, as the court directs.

Note to section 81.

This section is taken from section 655, subdivision 1 of the Code of Civil Procedure.

§ 82. **When attachment discharged, et cetera, property to be restored to defendant.**— Where a warrant of attachment or a writ of replevin is vacated, or annulled, or an attachment is discharged, upon the application of the defendant, the marshal must, except in a case where it is otherwise expressly prescribed by law, upon an order made by the court to that effect, deliver over to the defendant, or to the person entitled thereto, upon reasonable demand, and upon payment of all costs, charges and expenses, legally chargeable by the marshal, all the attached personal property remaining in his hands, or that portion thereof, as to which the attachment is discharged; or the proceeds thereof, if it has been sold by him.

Note to section 82.

This section is the same as section 709 of the Code of Civil Procedure.

§ 83. **Service of summons and warrant on defendant.**— The marshal must, immediately after making inventory, and at least six days before the return day of the summons, serve the summons, together with the warrant of attachment and inventory, upon the defendant, by delivering to him personally a copy of each, if he can, with reasonable diligence, be found within the city, or if he cannot be so found, by leaving a copy of each, certified by the marshal at the last place of residence of the defendant in the city, with a person of suitable age and discretion, or if such person cannot be found there, by posting them on the outer door, and also depositing another copy of each in the post-office, inclosed in a sealed post-paid wrapper, directed to the defendant at his residence; or if the defendant has no place of residence in the city, by delivering them to the person in whose possession the property attached is found.

Note to section 83.

This section is substantially section 1321 of the Consolidation Act (Laws 1882, chap. 410), and is the same as section 2910 of the Code of Civil Procedure, relating to justices' courts. Section 55 provides that an order of arrest, warrant of attachment, or requisition to replevy shall be served and executed by a marshal.

§ 84. **Undertaking by defendant.**— The defendant, or his attorney, or agent in his behalf, may, at any time before judgment is rendered in the action, execute and deliver to the marshal an undertaking to the plaintiff in a sum specified therein, at least twice the value of the property attached, as stated in the inventory, with one or more sureties, approved by the marshal or by a justice of the court, and to the effect, that if the judgment is rendered against the defendant and an execution is issued thereupon, within six months after the giving of the undertaking, the property attached shall be produced to satisfy the execution. Thereupon the marshal must deliver the property to the defendant.

Notes to section 84.

This section is the same as section 1322 of the Consolidation Act (Laws 1882, chap. 410), and is section 2911 of the Code of Civil Procedure, relating to justices' courts.

Undertaking to discharge attachment.— As to effect of undertaking to discharge attachment, see *Cockroft* v. *Clafflin*, 64 Barb. 464.

The sheriff must retain the property attached until the sureties justify, when bond is given by defendant claiming redelivery to him. *Moses* v. *Waterbury Button Co.*, 15 Abb. Pr. N. S. 205.

One undertaking cannot be given to discharge two attachments, issued in different actions. *Walton* v. *Daly*, 17 Hun, 601.

§ 85. **Claim by third person; bond and delivery thereupon.**— If a person, not a party to the action, claims any property attached, which is not reclaimed by the defendant, as prescribed in the last section, he may, at any time after the seizure and before execution is issued upon a judgment rendered in the action, execute and file with the clerk a bond to the plaintiff, with one or more sureties approved by the marshal or by a justice, in a penalty at least twice the value of the property claimed, and conditioned that, in an action upon the bond to be commenced within three months thereafter, the claimant will establish that he was the general owner of the property claimed at the time of the seizure; or if he fails so to do, that he will pay to the plaintiff the value thereof, with interest. The marshal must thereupon deliver the property claimed to the claimant.

Notes to section 85.

This section is substantially the same as section 1323 of the Consolidation Act (Laws 1882, chap. 410), and the same as section 2912 of the Code of Civil Procedure.

Bond; when insufficient.— These provisions are for the benefit of the real owner, as well as of that of the plaintiff, and a bond for less than double the value of the property, though it be more than double the amount of the debt for which the attachment was issued, is insufficient. *Kamena* v. *Warren*, 6 Duer, 698; s. c., 6 Abb. 193.

Undertaking.— A third party claiming the property attached, and offering an undertaking under section 1323 of the Consolidation Act, gains thereby simply the right to the possession of the property pending the determination of his title thereto, in an action to be brought upon the undertaking, which does not stay proceedings in the action

in which the attachment issued until the determination of the question of title. *Finn* v. *Mehrbach*, 30 Civ. Proc. Rep. 242, 65 N. Y. Supp. 250.

§ 86. **Judgment upon bond.**— A judgment for the plaintiff, in an action upon a bond, given as prescribed in the last section, must award to him the value of the property seized and delivered to the claimant, with interest thereupon from the time of the delivery. If the amount so recovered exceeds the amount which the plaintiff recovers in the action in which the warrant of attachment was issued, he is liable to the defendant in that action for the excess.

Note to section 86.

This section is the same as section 1324 of the Consolidation Act (Laws 1882, chap. 410), and the same as section 2913 of the Code of Civil Procedure, relating to justices' courts.

§ 87. **Action upon undertaking where warrant is vacated.**— If the warrant of attachment is vacated or annulled, the defendant may maintain an action, upon the bond and undertaking specified in the last two sections, in his own name, in the same manner and with the like effect as the plaintiff might have done if the warrant had remained in full force.

Notes to section 87.

This section is the same as section 1325 of the Consolidation Act (Laws 1882, chap. 410), and the same as section 2914 of the Code of Civil Procedure, relating to justices' courts.

Annulled.— As to the meaning of this word in this section, see § 3343, subd. 12, Code Civ. Proc.

Expenses and counsel fees.— Expenses and counsel fees, incurred by a party in preparing for and trying an attachment suit, are recoverable under the bond given upon the issuing of the attachment. *Northrup* v. *Garrett*, 17 Hun, 497.

Where a motion to vacate an attachment, although at first successful, is denied on appeal, but not apparently on the merits, and the action is thereafter tried and results in a judgment dismissing the complaint, the surety upon the undertaking given to secure the attachment is liable for the costs and expenses of the proceedings to vacate the attachment as well as for the costs and expenses of defending the

action. *Tyng* v. *American Surety Co.*, 69 App. Div. 137. And see s. c., 48 App. Div. 240, 62 N. Y. Supp. 843.

Objections to sufficiency of the bond, or the manner of its execution must be made on the trial. They cannot be raised on appeal. *Northrup* v. *Garrett*, 17 Hun, 497.

See also § 1, subd. 3, and notes.

§ 88. **Return by marshal attaching.**— The marshal executing the warrant of attachment must, at the time when and the place where it is returnable, make a return thereto, under his hand, stating all his proceedings thereupon. He must deliver to the clerk, with the return, each bond or undertaking delivered to him, pursuant to any of the foregoing provisions of this article, and a copy certified by him, of the inventory of the property attached. The return must state the manner in which the warrant and inventory were served, and, if they were served otherwise than by delivering a copy thereof to the defendant personally, the reason therefor, and the name of the person to whom the copy was delivered, unless his name is unknown to the marshal; in which case the return must describe him so as to identify him, as nearly as may be.

Notes to section 88.

This section is the same as section 1326 of the Consolidation Act (Laws 1882, chap. 410), and the same as section 2915 of the Code of Civil Procedure, relative to justices' courts.

Insufficient return.— Where the officer in his return to an attachment stated that "because the defendant could not be found in the city and county of New York, I left a copy of the within attachment and of said inventory, duly certified by me, at the last place of residence of the said defendant,"— *Held* defective. The place of residence should have been stated specifically, or at least whether it was within the county of New York. *Egbert* v. *Watson*, 21 How. 429. And see *Rosenfield* v. *Howard*, 15 Barb. 546.

A return of a levy, without stating that a copy of the attachment was served by leaving a copy at the dwelling-house or other place of abode of the defendant is not sufficient. *Willard* v. *Sperry*, 16 Johns. 121.

Sufficient return.— A return of a levy on property without saying "of the defendant," or a return of a delivery of a copy, without saying "a certified copy,"— *Held* sufficient. *Johnson* v. *Moss*, 20 Wend. 145; *Van Kirk* v. *Wilds*, 11 Barb. 520, and other cases. See *Willard* v.

Sperry, 16 Johns. 121; *Johnson* v. *Moss*, 20 Wend. 145; *Van Kirk* v. *Wilds*, 11 Barb. 520, 4 N. Y. 254, 36 How. 326.

§ 89. **Application to vacate or modify warrant of attachment.** — A defendant, whose property has been attached, may, upon the return of the summons, or before such return on written notice of at least twenty-four hours to the plaintiff or his attorney, apply to the court out of which the warrant of attachment issued to vacate or modify it, or to increase the plaintiff's security. Such an application may be founded upon the papers upon which the warrant was granted; or upon proof, by affidavit, on the part of the defendant, or upon both. If it is founded upon proof on the part of the defendant, it may be opposed by new proof, by affidavit, upon the part of the plaintiff, tending to sustain any ground for the attachment, recited in the warrant, but no other. The court may, upon the return of the summons, or at any other time to which the action is adjourned, vacate the warrant of attachment upon his own motion, if he deems the papers upon which it was granted insufficient to authorize it.

Notes to section 89.

This section is substantially the same as section 1327 of the Consolidation Act (Laws 1882, chap. 410), and of section 2916 of the Code of Civil Procedure, relating to justices' courts, with the exception that it permits the application to be also made *before* the return day named in the summons. See the next section (90) and § 2917, Code Civ. Proc.

See also notes to § 68, citing authorities on motion to vacate an order of arrest which apply as well to vacating a warrant of attachment, and notes to § 74, subd. 1.

Additional affidavits.— Additional affidavits will be allowed when, since the original application was made, it appears there has been a change in the condition of the parties, such as a general assignment by the defendant for the benefit of creditors. *Dickerson* v. *Benham*, 20 How. Pr. 343, affg. s. c., 19 How. Pr. 410; s. c., 12 Abb. Pr. 158, 10 Abb. Pr. 390.

Where the defendant moves to vacate on affidavits, the plaintiff may use additional affidavits, but only to contradict, answer, or explain those of the defendants, and not to remedy defects in the original papers. *Yates* v. *North*, 44 N. Y. 71.

Where a motion to set aside an attachment, issued upon an affidavit only, is made upon the affidavit upon which it was granted, and also upon the complaint, the plaintiff is entitled, upon the hearing, to read additional affidavits in support of the attachment. *Ives* v. *Holden*, 14 Hun, 402.

When the motion is founded solely on the affidavits upon which the attachment was granted, no additional affidavits in support of the original application can be allowed. *Hill* v. *Bond*, 22 How. Pr. 272.

The warrant cannot be sustained by the submission, on the motion to vacate, of additional affidavits which might have supported the attachment, on other grounds than that on which it was granted, although in support of the motion, affidavits other than those on which the warrant issued are presented by the moving party. *Acker, etc.* v. *Saynisch*, 25 Misc. Rep. 415, 54 N. Y. Supp. 937; affd. in 26 Misc. Rep. 836.

Affidavit, insufficiency of (see also notes to § 74, subd. 1).— It must not be upon information and belief, without giving the sources and grounds thereof. The *facts* to authorize the attachment *must appear by affidavit*. *Hill* v. *Bond*, 22 How. Pr. 272; *O'Reilly* v. *Freel*, 37 How. Pr. 272; *Brewer* v. *Tucker*, 13 Abb. 76; *Donnelly* v. *Corbett*, 7 N. Y. 500; *Greene* v. *Gonzales*, 2 Daly, 412.

Upon a motion to vacate an attachment, the question is not one of jurisdiction, but whether, upon the facts presented, the attachment ought to issue; and this is so when the motion is founded upon the alleged insufficiency of the affidavits upon which the order for attachment was granted. *Allen* v. *Meyer*, 73 N. Y. 1.

Cause of action.— The affidavit on which an attachment is granted must show that a cause of action exists in favor of plaintiff. It must state the facts out of which the cause of action arose. A mere recital of facts without a direct statement of their existence is insufficient. *Manton* v. *Poole*, 4 Hun, 638.

Where the affidavit omits to state the ground of action, the omission affects the jurisdiction, and cannot be remedied by amendment. The attachment must be set aside. *Zeregal* v. *Benoist*, 33 How. Pr. 129.

To authorize an attachment it is not sufficient to state the amount of plaintiff's claim, and the legal conclusion that he has a just cause of action; the grounds or the subject-matter of the claim must be set forth. The omission of this statement cannot be supplied on a motion to discharge the attachment. *Richter* v. *Wise*, 6 N. Y. Super. 70.

A warrant of attachment cannot be set aside on motion, where the facts stated in the affidavit on which the warrant was granted have a legal tendency to show that the statutory ground for the attachment exists, and are such as fairly called for the exercise of the judgment of the magistrate who granted the warrant, as to their sufficiency. *Allen* v. *Meyer*, 7 Daly, 229.

Complaint.— An order vacating an attachment on the merits of the action will be reversed, unless the complaint is so defective that plaintiff cannot recover. *Goodyear* v. *Commercial Fire Ins. Co.*, 59 App. Div. 611. See also *Fox* v. *Mays*, 46 App. Div. 1, 61 N. Y. Supp. 295.

Copy papers served.— The justice may dismiss the action and vacate an attachment on the return day on motion of the defendant, and may do so upon the copies served where the original summons and attachment have not been returned. *Risk* v. *Uffalman*, 7 Misc. Rep. 133.

Counter-affidavits.— On a motion to vacate an attachment founded upon affidavits on the part of the defendant, it is competent for the plaintiff to read counter-affidavits in opposition. *Hill* v. *Bond*, 22 How. Pr. 272.

Attachment, erroneous; no ground to vacate proper judgment.— Under the provisions of the Code of Civil Procedure, error of the justice in refusing to set aside a warrant of attachment issued against the property of a defendant is not ground for reversal of a judgment against the defendant, subsequently rendered in the action, upon an appeal from such judgment to this court, there being no ground to reverse the judgment, however erroneous it was to refuse to vacate the attachment. *Rosenthal* v. *Grouse*, 12 Daly, 529; s. c., 1 How. N. S. 447, 7 Civ. Proc. Rep. 135; *Schnauffer* v. *Catterbury*, 32 N. Y. St. Rep. 694; s. c., 10 N. Y. Supp. 543; *Bump* v. *Daheny*, 36 N. Y. St. Rep. 114.

Where an attachment is issued against the defendant's property, error in issuing the attachment, or in refusing to set it aside on motion, is not ground for reversal of a judgment for plaintiff for the amount sued for, with interest and costs, not including the marshal's fees on the attachment. *Schnauffer* v. *Catterbury*, 16 Daly, 353.

Fictitious name.— This court has no authority, and never had, to grant attachments against persons by fictitious names. *McCabe* v. *Doe*, 2 E. D. Smith, 64; *Gardner* v. *McKraft*, Daily Reg., Feb. 23, 1877; *Davenport* v. *Doady*, 3 Abb. Pr. 409; *Solinger* v. *Patrick*, 7 Daly, 408. These attachments were therefore absolutely void, together with all proceedings under them, and as this appeared upon the face of them, they afforded no protection to the marshal. *Patrick* v. *Solinger*, 9 Daly, 151.

Intent.—Where the allegations in the affidavit are as consistent with honesty of intent on the part of defendant as with a dishonest one, the attachment is properly vacated. *Bernhard* v. *Cohen*, 27 Misc. Rep. 363.

Irregularities.— An order to show cause why an attachment should not be vacated should specify the irregularities complained of. *Weehawken Wharf Co.* v. *Kniekerboeker Coal Co.*, 22 Misc. Rep. 559, 49 N. Y. Supp. 1001. But see *Andrews* v. *Scofield*, 27 App. Div. 90, 50 N. Y. Supp. 132.

Merits of action.— On motion to set aside the attachment, court will not try the merits of the action. *Bank of Commerce* v. *Rutland, etc.*,

R. R. Co., 10 How. 1, 6; *Romeo* v. *Garofalo*, 25 App. Div. 191, 49 N. Y. Supp. 114; *Peek* v. *Brooks*, 31 Misc. Rep. 48, 64 N. Y. Supp. 546; *Thorn* v. *Alvord*, 32 Misc. Rep. 456.

Mistake in the warrant as to the nature of the cause of action is not fatal to the validity of the attachment though it must state the ground of the attachment. *Fox* v. *Mays*, 46 App. Div. 1, 61 N. Y. Supp. 295.

Motion, when it may be made.— It is not necessary that a motion to vacate an attachment should be made before judgment; and an order of court granting a motion to open a default, but allowing the judgment entered to stand as security, does not preclude the defendant from afterward moving to vacate judgment. So *held*, where the objection to the attachment went to the jurisdiction. *Sweezy* v. *Bartlett*, 3 Abb. Pr. N. S. 444.

Nonresident.— It is good ground for vacating an attachment, issued against an alleged nonresident, and absconding defendant, that his absence from his place of abode was open and notorious; that he made no efforts to conceal the same; that his conduct was not designed to place any one on a false scent, or to evade service of process, and that he omitted nothing which he was legally bound to do, to enable the plaintiff to find him. The mere failure of a plaintiff to learn the whereabouts of a defendant affords no evidence of culpable conduct on his part. *Sweezy* v. *Bartlett*, 3 Abb. Pr. N. S. 444.

Original papers.— On a motion to vacate on the original papers, all the allegations therein, as well as fair inferences to be deduced therefrom, are to be taken as true. *Reedy Elevator Co.* v. *American Grocery Co.*, 24 Misc. Rep. 678, 53 N. Y. Supp. 989.

Upon a motion to vacate an attachment on the affidavits on which it was granted, plaintiff, who obtained it, is entitled to the benefit of all legitimate inferences from the facts shown. *Stewart* v. *Lyman*, 62 App. Div. 182.

Pleadings, if not before the court when the attachment was granted, are not to be regarded by the court on the motion to vacate in determining the sufficiency of the affidavit. *Fox* v. *Mays*, 46 App. Div. 1, 61 N. Y. 295. See also *Goodyear* v. *Commercial Ins. Co.*, 59 App. Div. 611.

Second application.— Where an attachment has been vacated by the court, after opposition and argument on the merits of the application, another application for the attachment on substantially the same facts, whether before the same or another court, will not be entertained. The defendant is not to be continually vexed by the same application; nor are the same or different tribunals to hear and decide upon the same matters more than once. *Sehlemmer* v. *Myerstein*, 19 How. Pr. 412.

Defendant, who has been defeated in his application to vacate an attachment on the papers on which it was granted, may again move

upon affidavits without leave of the court. *Hawkins* v. *Pakas*, 44 App. Div. 395.

Subsequent attaching creditors.— In the absence of fraud or collusion, any irregularity in the issuing of an attachment, which is waived by the debtor, cannot be taken advantage of by a subsequent attaching creditor. *Jacobs* v. *Hogan*, 15 Hun, 197.

Summons.— An attachment will not be vacated because no summons in the action accompanied the papers on which it was granted, and they do not state that an action has been begun. *Maury* v. *American Motor Co.*, 25 Misc. Rep. 657.

§ 90. **Effect of vacating warrant.**— Vacating the warrant of attachment does not affect the jurisdiction of the court to hear and determine the action, where the defendant has appeared generally in the action; or where the summons was served personally upon him, or where judgment may be taken against him, as being indebted jointly with another defendant, who has been thus summoned or has thus appeared. In every other case the justice who vacates a warrant of attachment against the property of a defendant must dismiss the action as to him.

Notes to section 90.

This section is the same as section 1328 of the Consolidation Act (Laws 1882, chap. 410), and the same as section 2917 of the Code of Civil Procedure, relative to justices' courts.

Provisional remedy.— An attachment is usually a provisional remedy, and an error of the justice in regard to such a remedy will not cause the reversal of the judgment, if the action is properly decided on the merits. *Rosenthal* v. *Grouse*, 12 Daly, 529; s. c., 1 How. N. S. 447, 7 Civ. Proc. Rep. 135; *Bump* v. *Dehany*, 36 N. Y. St. Rep. 114.

Jurisdiction depends upon the service of the summons and not upon whether a provisional remedy is vacated or not. *McNeary* v. *Chase*, 30 Hun, 491.

§ 91. **Judgment where property has been attached.**— Where the defendant has not appeared, and the summons has not been personally served upon him, and property of the defendant has been duly attached by virtue of a warrant which has not been vacated, the court must proceed to hear and determine the action; but in an action subsequently brought, the judgment is only presumptive evidence of the indebted-

ness, and the defendant is not barred from any counterclaim against the plaintiff. The execution, issued upon a judgment so rendered, must require the marshal to satisfy it out of the property so attached, without containing a direction to satisfy it out of any other property.

Notes to section 91.

This section is the same as section 1329 of the Consolidation Act (Laws 1882, chap. 410), and the same as section 2918 of the Code of Civil Procedure, relative to justices' courts. See also § 271.

Personal service of process.— Under the act establishing regulations for the port of New York (Laws 1857, chap. 671), this court cannot acquire jurisdiction to render judgment against the master of a vessel for a penalty imposed by the act merely by attachment of the vessel, and without personal service of process on the master. *The Board of Comrs. of Pilots* v. *Dick*, 5 Daly, 391.

§ 92. **Sections applicable as to undertaking, et cetera.**— Sections one hundred and six to one hundred and ten of this revision, inclusive, and sections one hundred and twenty-seven and one hundred and twenty-eight, in so far as they relate to undertaking, sureties and justification, apply to proceedings under this title, and the exceptions to, and examination of, sureties, whether on undertaking, or bail, may be made and conducted by the adverse party, as prescribed therein.

Notes to section 92.

This section is new. See also § 70.

Amendment of undertaking.— See notes to § 3 ("Removal").

Mistakes, omissions, defects, and irregularities, and general rules respecting affidavits, bonds, and undertakings.—Code Civ. Proc., §§ 728, 729, 730, and 810 to 816, relating to affidavits and undertakings, apply to this court by section 3347, subdivision 6, of said Code, making them applicable to *all* courts.

NOTE.— There are no sections 93 or 94.

ARTICLE III.

Replevin.

SECTION 95. Replevin.
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* Should be "Joinder" (see § 131).

§ 95. **Action to recover a chattel.**— An action to recover a chattel, with or without damages, for the wrongful taking, withholding, or detention thereof, may be brought in the municipal court of the city of New York, except:

1. Where the chattel was taken by virtue of a warrant, against the plaintiff, for the collection of a tax, assessment or fine, issued in pursuance of a statute of the state, or of the United States: unless the taking was, or the detention is, unlawful, as specified in section ninety-seven of this act.

Notes to section 95.

This section is taken from section 1331 of the Consolidation Act (Laws 1882, chap. 410), and sections 1219 and 1690 to 1692 of the Code of Civil Procedure. These sections of the Code constitute the six subdivisions of this section instead of separate enactments, as contained in said Code.

In the note to section 1331, on page 218 of the Fourth Edition of this work, we said: "In his preliminary note to chapter XIV, title II, 'Actions Relating to Chattels,' under article I, 'Action to Recover a Chattel,' Mr. Throop, one of the commissioners who revised the statutes, states that 'Doubtless the profession will welcome the restoration to the statute-book of the familiar words, "replevy" and "replevin," after their banishment therefrom for more than a third of a century;' and yet, for the sake of accuracy, the entire chapter is devoted not to 'replevin,' but to 'actions to recover and to foreclose a lien upon a chattel.' And nowhere in the Code is the term 'replevin' used until chapter XIX, article V, is reached, which applies to 'justices' courts.'"

Article III of title III of this act is headed "Replevin," while section 95 is headed "Action to recover a chattel." Section 55 speaks of a "Requisition to replevy."

The commission who framed the present act under Laws 1901, chap. 218, and reported the same to the Legislature under their note to section 95, use the word "Replevin." It is not for us to reconcile this apparent mixture. This procedure was known in England as the "Writ of Replevin," and so brought over from the mother country to this country. For a history of the remedy by replevin in England and in this country, the student will be both instructed and enlightened by reading the case of *Manning* v. *Keenan*, 73 N. Y. 45.

As to "When the action lies" and "Questions of jurisdiction," see § 1, subd. 9.

As to jury fees in an "Action to recover a chattel," where defendant demands a jury of twelve men, see § 234.

Bailee and bailor; tender.— Where a bailee refuses to deliver the goods to the bailor, on the ground that the latter is not entitled to

take them, averring an intention to contest his right in the courts, it is not necessary for the bailor to tender the fees due for the storage of the goods, before commencing an action for the recovery thereof. *Long Island Brewery Co.* v. *Fitzpatrick*, 18 Hun, 389.

Where the plaintiff claims to recover on the ground that the property was only leased, whereas the defendant claims as purchaser, the plaintiff must not only tender before suit repayment of the money received, but must keep his tender good by a deposit of the money, or an offer at the trial to pay into court. *Dodge* v. *Fearey*, 19 Hun, 277.

Complaint.— The complaint in a claim and delivery action need not be in any specific form; the only requirement in reference thereto is the general one, that it shall contain a plain and concise statement of the cause of action. *Western R. R. Co.* v. *Bayne*, 75 N. Y. 1.

As to what is sufficient complaint, see *Banfield* v. *Haeger*, 45 N. Y. Super. (J. & S.) 428.

As to what is necessary to be shown to make out a case in a claim and delivery action, see *Hammond* v. *Schultze*, 45 N. Y. Super. (J. & S.) 611.

In an action to recover a chattel, a failure to allege that the taking was wrongful is not fatally defective, if the facts averred clearly show this to be the case. *Button* v. *Lusk*, 19 Civ. Proc. Rep. 111.

The receipt of goods by means of a sale induced by fraud is tortious taking, and in such case the complaint in replevin need not set out the facts showing that their detention was wrongful. *Gowing* v. *Warner*, 30 Misc. Rep. 593, affg. 29 Misc. Rep. 593, 62 N. Y. Supp. 797.

Detention after the trial is a new offense constituting a new cause of action. *Corn Exchange Bank* v. *Blye*, 56 Hun, 403, 32 N. Y. St. Rep. 78.

Reversal of judgment.— The title of the purchaser on execution is annulled and the owner entitled to recover his property back when the judgment in the action in which the attachment issued has been reversed. *Reinmiller* v. *Skidmore*, 7 Lans. 161.

Sheriff.— This court has jurisdiction of actions against the sheriff to recover chattels. *Price* v. *Grant*, 15 Daly, 436.

Taking the property from other than defendant.— A requisition in an action for the claim and delivery of personal property only authorizes the taking of the chattels specified from the defendant named in the action or his agent; it is no protection when he takes them from another, in an action of trespass brought by the latter. *Otis* v. *Williams*, 70 N. Y. 208. See also *Bullis* v. *Montgomery*, 50 N. Y. 352.

2. Where it was seized by virtue of an execution, or a warrant of attachment, against the property of the plain-

tiff, unless it was legally exempt from such seizure, or is unlawfully detained, as specified in section ninety-seven of this act.

Notes to section 95, subdivision 2.

Legal custody.— In a replevin proceeding the property is in legal custody as to strangers thereto, so that it cannot be reached by execution. *First Nat. Bank* v. *Dunn*, 97 N. Y. 149, revg. 29 Hun, 529.

While property is in the hands of the sheriff, under a warrant of replevin, it cannot be levied upon by virtue of an execution against the defendant in the replevin action. *Tramain* v. *Mortimer*, 28 N. Y. St. Rep. 548.

So, while property is in possession of the property clerk of the police department by order of the magistrate pending a prosecution, it is in the custody of the law, and the owner's right of possession cannot be enforced while the circumstances justify a retention for purposes of police justice. *Simpson* v. *St. John*, 93 N. Y. 363.

3. Where it was seized by virtue of an execution, or a warrant of attachment, against the property of a person other than the plaintiff, and at the time of the commencement of the action the plaintiff had not the right to reduce it into his possession.

4. Where a chattel is replevied in an action to recover the same, and a final judgment awarding the possession thereof to the defendant is rendered, a subsequent action to recover the same chattel cannot be maintained by the plaintiff, for the same cause of action. But the judgment does not affect his right to maintain an action to recover damages, for taking or detaining the same or any other chattel, unless it was rendered against him upon the merits.

5. If plaintiff's title be by transfer, made since wrongful taking, or during wrongful detention, no action can be maintained unless the person from or through whom the plaintiff derived title might have maintained the same, had the transfer not been made.

§ 96. **Affidavit and undertaking by plaintiff.**— The plaintiff may, at the time the summons is issued, but not afterwards, require the chattel to be replevied as prescribed in this act. For that purpose he must deliver to the court, an

affidavit and a written undertaking as herein prescribed, which must be filed with the clerk of the court in the district in which the action is brought.

Notes to section 96.

This section is taken from section 1332 of the Consolidation Act (Laws 1882, chap. 410), which is the same as section 2920 of the Code of Civil Procedure, relative to justices' courts. It will be noticed that the affidavit and undertaking must be filed with the *clerk*.

Affidavit.— For authorities as to the affidavit, see § 97.

Allowance, or approval of undertaking.— See § 110.

Amendments to undertakings.— See notes to § 3 ("Removals").

Exception to, and justification of, sureties.— See §§ 70, 106, 108, 109.

Mistakes, omissions, defects, and irregularities; and general regulations respecting affidavits, bonds, and undertakings.— Code Civ. Proc., §§ 728, 729, 730, and 810 to 816, relating to affidavits and undertakings, apply to this court, by subdivision 6, section 3347, of said Code, making them applicable to *all* courts.

Undertaking.— For authorities as to undertakings, see §§ 99, 107, and notes.

§ 97. **Affidavit therefor, before commencement of action.**— The affidavit prescribed in the last section, must particularly describe the chattel to be replevied and must contain the following allegations:

1. That the plaintiff is the owner of the chattel, or is entitled to the possession thereof, by virtue of a special property therein; the facts with respect to which must be set forth.

2. That it is wrongfully detained by the defendant.

3. The alleged cause of the detention thereof, according to the best knowledge, information, and belief of the person making the affidavit.

4. That it has not been taken by virtue of a warrant, against the plaintiff, for the collection of a tax, assessment or fine, issued in pursuance of a statute of the state, or of the United States; or, if it has been taken under color of such a warrant, either that the taking was unlawful, by reason of defects, in the process, or other causes specified, or that the detention is unlawful by reason of facts specified which have subsequently occurred.

Notes to section 97 and subdivisions 1, 2, 3 and 4.

This section is new, and is taken from section 1695 of the Code of Civil Procedure. See notes to § 95, subd. 1, and also § 96.

Additional or supplemental affidavit may be allowed when the original is defective, or plaintiff may have leave to amend it. *Depew* v. *Leal*, 2 Abb. 131; *Spaulding* v. *Spaulding*, 3 How. 297; *Dows* v. *Green*, 3 How. 377.

Demand.— As to necessity of demand, see *Clark* v. *Meigs*, 22 How. 340, 13 Abb. 467, revg. 21 How. 187; *Simser* v. *Cowan*, 56 Barb. 395. See also *Kaufman* v. *Klang*, 16 Misc. Rep. 379.

Where the taking was not wrongful, and the action is based on the wrongful detention of the property, or in the *detinet*, demand must be made before suit. 3 Abb. Pr. 383, 13 How. Pr. 219, 2 Abb. Pr. 167, 37 How. Pr. 109, 1 Sweeney, 215.

Where the plaintiff's case depends upon a wrongful detention without a wrongful taking, an averment in the complaint of a demand and refusal is necessary. *Scofield* v. *Whitelegge*, 10 Abb. Pr. N. S. 104; aff'd., Court of Appeals (see 12 Abb. Pr. N. S. 320, and 49 N. Y. 259); *Levin* v. *Russell*, 42 N. Y. 251, explained and distinguished; *Talcott* v. *Belding*, 46 How. 419. See also *The Howe Sewing Machine Co.* v. *Haupt*, 7 Daly, 108.

Demand must be alleged and proved in order to maintain replevin for wrongful detention where the property came rightfully into defendant's possession. *Treat* v. *Hathorn*, 3 Hun, 646.

Proof of demand before service of the papers is sufficient. *Irr* v. *Schroeder*, 6 Civ. Proc. Rep. 253.

Demand and refusal is the usual proof of conversion where defendant did not come into possession wrongfully. *Rawley* v. *Brown*, 18 Hun, 456. A denial of title amounts to conversion when given in response to a demand. *Nelson* v. *Neil*, 12 Week. Dig. 154.

Unless demand is proved, a failure to return cans in which milk has been received as per agreement does not show a conversion. *Riverson* v. *Kauffield*, 13 Hun, 387.

Where the defendant was notified that the property belonged to the plaintiff, before he took it, the action lies without a demand and refusal. *Hallett* v. *Carter*, 19 Hun, 629.

A wife living apart from her husband may, after demand and refusal, maintain the action to recover her personal property which remained in the husband's house when she left it. *Howland* v. *Howland*, 20 Hun, 472.

A person who purchases, in good faith, goods at a sheriff's sale, which are in the possession of the judgment debtor, is not liable to an action for the recovery thereof, brought by the real owner, until demand and refusal to deliver them. *Rawley* v. *Brown*, 18 Hun, 456.

Id.; when not necessary.— Demand for the return of the property is not necessary before bringing replevin where the original taking was wrongful. *Schwabeland* v. *Holahan*, 10 Misc. Rep. 176; s. c., 62 N. Y. St. Rep. 518, 30 N. Y. Supp. 910.

Defendant being a warehouseman to whom a person other than the owner, who had unlawfully obtained possession of a piano, had delivered it for storage,— *Held*, that the owner could maintain an action for it without a previous demand. *Milligan* v. *Brooklyn Warehouse & Storage Co.*, 34 Misc. Rep. 55.

And an attachment is a protection to defendant or sheriff when there is no proof of a demand for a return of the property, after the attachment was vacated. *Lux* v. *Davidson*, 31 N. Y. St. Rep. 346.

A person who purchases, in good faith, goods at a sheriff's sale, which are in possession of the judgment debtor, is not liable to an action for the recovery thereof, brought by the real owner, until demand and refusal to deliver them. *Rawley* v. *Brown*, 18 Hun, 456.

Description of property in the affidavit should be plain enough so that the sheriff to whom it is delivered will be able to determine from it, with some degree of accuracy and intelligence, what he is required to replevy. *Van Dyke* v. *The N. Y. State Banking Co.*, 18 Misc. Rep. 661.

It is insufficient if a part of the goods are merely referred to by abbreviations the meaning of which is not shown by anything contained in the schedule nor in the affidavit, or by letters and figures which, read by themselves, are not descriptive at all, nor referred to in any part of the schedule or affidavit so that their meaning is made plain. *National E. & S. Co.* v. *Kaplan*, 53 App. Div. 96, 65 N. Y. Supp. 732.

Description in the affidavit, "10,000 wool pelts, the wool taken therefrom, and the skins thereof (otherwise known as slats), in pickle or lime,"— *Held* sufficient on motion to set aside service of the summons and the taking of the goods. *Marshal* v. *Friend*, 33 Misc. Rep. 443, 68 N. Y. Supp. 502.

Irregularity in the affidavit is waived by general appearance or by giving an undertaking and obtaining a return of the property. *Wis. M. & T. Ins. Co.* v. *Hobbs*, 22 How. 494; *Roberts* v. *Willard*, 1 Civ. Proc. Rep. 100; *Hyde* v. *Patterson*, 1 Abb. 248.

Mistakes, omissions, defects, and irregularities in affidavit, and amendment thereof. See notes to § 96.

Objection must be promptly taken, and before the time to answer has expired, and the irregularity must be specified in the notice of motion. *Paddock* v. *Guyder*, 29 N. Y. St. Rep. 773; s. c., 8 N. Y. Supp. 905; *Van Dyke* v. *The N. Y. State Banking Co.*, 18 Misc. Rep. 661.

Ownership.— An affidavit by the plaintiff that he is the "owner" of the property is sufficient without setting out the facts proving, or the manner of, such ownership. *Burns* v. *Robbins*, 1 Code Rep. 52; *Vandenburgh* v. *Van Valkenburgh*, 8 Barb. 217.

Right of possession.— The facts must be so shown as to make out a special property and right of possession. If it appears that the evidence of the facts rests in a writing, that must be set forth. *Depew* v. *Leal*, 2 Abb. Pr. 136.

The complaint must show a right of property and of possession in plaintiff. An allegation of wrongful detention is not sufficient. The latter is a conclusion of law, the former the facts upon which it is based. The facts must be pleaded, and without them the conclusion of law is an immaterial statement. An omission to allege these facts in the complaint is not cured by an averment in the answer denying ownership in the plaintiff. *Scofield* v. *Whitelegge*, 10 Abb. Pr. N. S. 104; affd., 12 Abb. Pr. N. S. 320, and 49 N. Y. 259.

Setting aside the affidavit.— This may be done if it is untrue. *Niagara E. Co.* v. *McNamara*, 1 Sheld. 360; affd., 2 Hun, 416, 4 T. & C. 604; *O'Reiley* v. *Good*, 42 Barb. 521, 18 Abb. 106; *Stockwell* v. *Veitch*, 38 Barb. 650, 15 Abb. 412.

5. That it has not been seized by virtue of an execution or warrant of attachment, against the property of the plaintiff, or of any person from or through whom the plaintiff has derived title to the chattel, since the seizure thereof; or, if it has been so seized, that it was exempt from the seizure, by reason of facts specified, or that its detention is unlawful, by reason of facts specified which have subsequently occurred.

Notes to section 97, subdivision 5.

Exemption.— The affidavit must state the facts bringing the property within the statutory exemption. It is sufficiently "shown" by "an allegation" that the property is so exempt; but mere belief that the property is so exempt is insufficient, unless it be added that such belief is founded on a knowledge of the law or the advice of counsel cognizant of all the facts of the case. *Spalding* v. *Spalding*, 3 How. Pr. 297, 1 Code Rep. 64; *Roberts* v. *Willard*, 1 Code Rep. 100.

6. Its actual value.

Notes to section 97, subdivision 6.

Value.— The value must be stated in the affidavit, and in its absence, or where it states the value of the chattels over the jurisdictional amount, the justice does not acquire jurisdiction. In the latter case the affidavit cannot be amended so as to acquire jurisdiction. *Jaynes* v. *Jaynes*, 8 Civ. Proc. Rep. 99; *Irr* v. *Schroeder*, 6 Civ. Proc. Rep. 253.

§ 98. **Where several chattels are to be replevied.**— Where the affidavit describes two or more chattels of the same kind, it must state the number thereof, and where it describes a chattel in bulk, it must state the weight, measurement, or other quantity. Where it describes two or more chattels, to be replevied, it may, at the election of the plaintiff, state the aggregate value of all, or separately the value of any chattel or of any class of chattels, and the aggregate value of the remainder, if any. Where it states separately the value of one or more chattels or classes of chattels, the defendant may require, as prescribed in the following provisions of this article, the return of any or all of the chattels or classes of chattels, the value of which is thus stated, or of the portion thereof which has been replevied. If he procures such a return, the remainder must be delivered to the plaintiff, except as is otherwise prescribed in this article.

Note to section 98.

This section is new and the same as section 1697 of the Code of Civil Procedure, which is explanatory of section 1695 of said Code. These two sections of the Code were referred to in section 1332 of the Consolidation Act (Laws 1882, chap. 410).

§ 99. **Plaintiff's undertaking for replevin.**— The undertaking must be executed by at least two sureties or by a fidelity or surety company, expressly authorized by law to execute an undertaking, which must be approved by the court. It must be to the effect that the sureties are bound in a specified sum not less than twice the value of the chattel, as stated in the affidavit, for the prosecution of the action, for the return of the chattel to the defendant, if possession thereof is adjudged to him, or if the action abates, or is discontinued, before the chattel is returned to the defendant; and for the payment to the defendant of any sum, which the judgment awards to him against the plaintiff.

Notes to section 99.

This section is new and is substantially the same as section 1699 of the Code of Civil Procedure, with the addition of permitting a fidelity or surety company to execute the undertaking.

Additional undertaking.— The court has no power to require an additional undertaking where the value stated in plaintiff's affidavit is claimed to be less than the true value. *N. S. L. & T. Co.* v. *Bussey*, 53 Hun, 516; *De Regine* v. *Lewis*, 3 Robt. 708.

And except the responsibility of the sheriff, defendant is entirely without remedy if the sheriff has taken sham security. *Manley* v. *Patterson*, 3 Code Rep. 89.

Amendment of undertaking.— See notes to § 3 ("Removal").

Defective undertaking.— A defective undertaking may be cured upon exceptions. *De Regine* v. *Lewis*, 3 Robt. 708. Or, it seems, the court will allow a new one *nunc pro tunc*. *Decker* v. *Judson*, 16 N. Y. 439, 443; *Newland* v. *Willetts*, 1 Barb. 20.

And the undertaking will not be vitiated by an error in the recital of the date of the affidavit. *Hyde* v. *Patterson*, 1 Abb. 248.

Exception to and justification of sureties.— By section 70 of this act sections 106 to 110 and sections 127 and 128, relating to undertakings, sureties, and justification, are made applicable.

Mistakes, omissions, and irregularities in the undertaking which may be corrected. See notes to § 1, subd. 3, and § 96.

§ 100. **When agent, et cetera, may make affidavit for replevin or return.**— The affidavit to be delivered to the court, in behalf of the plaintiff, with a requisition to replevy a chattel, may be made by the plaintiff's agent or attorney, if the material facts are within his personal knowledge; or if the plaintiff is not within the city of New York where the attorney resides or has his office, or is not capable of making the affidavit. The affidavit to be delivered to the court, either in behalf of the defendant, with a notice that he requires the return of the chattel, or in behalf of a person not a party, who makes a claim as prescribed in section one hundred and thirteen of this act, may be made by an agent or attorney, if the material facts are within his personal knowledge, or if the defendant or claimant as the case may be, is not within the city of New York, and capable of making the affidavit. When the affidavit is made by an attorney or agent, he must state therein what allegations, if any, are made upon his information and belief; and he must set forth therein the grounds of his belief, as to all matters not stated upon his knowledge, and the reason why the affidavit is not made by the party or the claimant.

Note to section 100.

This section is new and is substantially the same as section 1712 of the Code of Civil Procedure, except that it has been made to apply to this court, and the word "city" is used in the place of the word "county." See notes to §§ 95, 96, 97.

§ 101. **Requisition of justice.**— Upon receiving the affidavit and undertaking, the justice must indorse upon or attach to the affidavit a written requisition, subscribed by him, requiring the marshal to whom the summons is delivered to replevy the property described in the affidavit, on or before a day specified in the requisition, which must be at least six days before the return day of the summons. The affidavit, undertaking and requisition must be delivered to the marshal with the summons.

Note to section 101.

This section is taken from section 1333 of the Consolidation Act (Laws 1882, chap. 410), which was taken from section 2921 of the Code of Civil Procedure, appertaining to a justice's court, with the exception that the words "except in the case of a nonresident defendant" are stricken out.

§ 102. **How executed.**— If any chattel described in the affidavit is found in the possession of the defendant, or of his agent, the marshal to whom the summons, affidavit and requisition, together with a copy of the undertaking are delivered, after the undertaking and requisition have been approved by the court, as prescribed in the foregoing sections of this chapter, must forthwith replevy it by taking it into his possession. He must thereupon without delay serve upon the defendant a copy of the summons, affidavit, requisition and undertaking by delivering the same to him personally, if he can be found within the city of New York, or if he cannot be so found, to his agent, if any, from whose possession the chattel is taken; or if neither can be found within the city of New York, by leaving a copy at the usual place of abode of either, with a person of suitable age and discretion.

Notes to section 102.

This section is taken from section 1334 of the Consolidation Act (Laws 1882, chap. 410), which is substantially the same as section 2922 of the Code of Civil Procedure, appertaining to justices' courts.

Compensation of marshal are his lawful fees and necessary expenses for taking the property and keeping it, as taxed "by the court out of which the proceeding issued." See § 104 of this act. Formerly, under section 1711, of the Consolidation Act, the compensation was left to the discretion of the justice. *Stewart* v. *Fidelity Loan Assn.*, 19 Misc. Rep. 49.

Owner.— A requisition for the claim and delivery of personal property only authorizes the taking of the chattels from the defendant named in the action, or his agent. It is no protection when he takes them from another. The fact that the plaintiff is a married woman and that defendant is her husband and agent does not affect the legal status of such owner. *Otis* v. *Williams*, 70 N. Y. 208. See also *Hess* v. *Sprague*, 13 Week. Dig. 164; *Deutsch* v. *Reilly*, 8 Daly, 132; *King* v. *Oser*, 4 Duer, 433.

§ 103. **How executed if property concealed, et cetera.**— If any chattel, described in the affidavit, is secured or concealed in a building or inclosure, the marshal must publicly demand its delivery. If it is not delivered, pursuant to the demand, he must cause the building or inclosure to be broken open, and must take the chattel into his possession.

Notes to section 103.

This section is the same as section 1701 of the Code of Civil Procedure, with the exception of the word "sheriff," for which the word "marshal" has been substituted.

Power of marshal.— A constable has the same power under this section as the sheriff, and after knocking at a house and calling the name of defendant, he may force an entrance, and finding no one inside need not read aloud the list of articles. *Howe* v. *Oyer*, 50 Hun, 559. See also § 304.

§ 104. **Marshal to keep in possession; when and how to deliver.**— A marshal who has replevied a chattel, must retain it in his possession, keeping it in a secure place, until the person who is entitled to the possession thereof, is ascertained, as prescribed in this title. He must then deliver it to that person upon request and payment of his lawful fees,

and necessary expenses for taking and keeping it, as taxed by the court, out of which the proceedings issued.

Notes to section 104.

The first part of this section is taken from section 1702 of the Code of Civil Procedure, with the exception of the word "sheriff," for which the word "marshal" has been substituted, and the provision as to the marshal's fees and expenses to be taxed by the court, which has been added, is taken from section 1711 of the Consolidation Act (Laws 1882, chap. 410). The words in the latter provision, "*as taxed by the court out of which the proceedings issued*," probably means as taxed by the justice holding court in the district in which the action is brought, as there is only one court, and therefore the words after the word "court" are unnecessary and may be regarded as surplusage. See also *Stewart* v. *Fidelity Loan Assn.*, 19 Misc. Rep. 42. See also § 304.

Care of the property.— It is not sufficient that the sheriff use ordinary diligence in the care of the property; he must preserve it safe. *Moore* v. *Westervelt*, 21 N. Y. 103; s. c., 27 N. Y. 239; Edwards on Bailments, 59.

The officer is primarily bound by his process to keep the property, or to deliver it to the plaintiff; the service of affidavit and notice of claim suspends that obligation, and releases him from it unless indemnity is given; when given, the obligation again attaches, and the claim of the person entitled to the property is valid, the officer being required to rely on the indemnity. *Manning* v. *Keenan*, 73 N. Y. 45.

The plaintiff does not release the sheriff from his liability by receiving property in its damaged condition, although damaged through his negligence. *Moore* v. *Westervelt*, *supra*. And see *First National Bank* v. *Dunn*, 29 Hun, 529; s. c., 97 N. Y. 149.

§ 105. **Return to requisition.**— The marshal must, on or before the return day of the summons, make a return to the requisition, under his hand, stating all his proceedings thereupon; and file it, with the affidavit, undertaking, and requisition, with the clerk in the district in which the action is brought. The return must state the manner in which the summons, affidavit, requisition and undertaking were served; and, if they were served otherwise than by delivering the requisite copies to the defendant personally, the reason therefor and the name of the person to whom the copies were delivered, unless his name is unknown to the

marshal, in which case the return must describe him so as to identify him, as nearly as may be.

Note to section 105.

This section is taken from section 1335 of the Consolidation Act (Laws 1882, chap. 410), which was substantially the same as section 2923 of the Code of Civil Procedure, relating to justices' courts. The word "undertaking" has been included in this section.

§ 106. **Defendant when to except to sureties; proceedings thereupon.**— At any time after the chattel has been replevied, and at least two days before the return day of the summons, the defendant, unless he requires a return of the chattel, may serve upon the plaintiff, or upon the marshal, a written notice that he excepts to the plaintiff's sureties, otherwise he is deemed to have waived all objections to them. If such a notice is served, the sureties must justify upon the return of the summons, or the plaintiff must then give new undertaking to the same effect as the original undertaking, with other sureties, who must then appear and justify before the court.

Notes to section 106.

This section is taken from section 1336 of the Consolidation Act (Laws 1882, chap. 410), which was the same as section 2924 of the Code of Civil Procedure, relating to justices' courts. The nonresident portion is stricken out.

See §§ 70 and 92, making this section to §§ 110 and 127 and 128 applicable.

Failure to justify.— Where defendant in replevin duly excepts to the sufficiency of plaintiff's sureties, they must justify upon the return of the summons, and their mere presence in court is not sufficient, and if plaintiff neglects to procure the justification, defendant, unless he consents to an adjournment of the justification, is entitled to the immediate return of the property taken by the marshal, in default of which the marshal becomes personally liable therefor. *Koerkle* v. *Pangburn*, 30 Misc. Rep. 776.

Effect of exception.— By excepting to plaintiff's sureties the defendant waives his right to a return, although they fail to justify. *Cullen* v. *Miller*, 5 Abb. N. C. 282. See also *Hofheimer* v. *Campbell*, 59 N. Y. 269.

This latter decision is apparently overruled by section 1706 of the Code of Civil Procedure. See however § 107 of this act.

When chattels to be returned.— Where defendant excepts to the sufficiency of plaintiff's sureties in replevin, the plaintiff must either procure a satisfactory justification of such sureties or furnish another undertaking to the same effect as the original, the sureties in which must appear and justify before the justice. If neither of these things are done, it is the duty of the constable who seized the chattel to return it to the defendant. *Goff* v. *Bliss*, 12 Civ. Proc. Rep. 99.

§ 107. **Defendant may reclaim chattel; proceedings thereupon.**— At any time before the return of the summons, the defendant may, if he does not except to the plaintiff's sureties, serve upon the clerk a notice that he requires the return of the chattel replevied. With the notice he must deliver to the clerk the following papers:

1. An affidavit, containing an allegation, either that the defendant is the owner of the chattel, or that he is lawfully entitled to the possession thereof, by virtue of a special property therein, the facts with respect to which must be set forth.

2. An undertaking, executed by at least two sureties, or a fidelity or surety company, specifically authorized by law to act instead of sureties, to the effect that they are bound, in a specified sum, not less than twice the value of the chattel, as stated in the affidavit of the plaintiff, for delivery thereof to the plaintiff, if delivery thereof is adjudged, and for the payment to him of any sum, which the judgment awards against the defendant. The sureties in the undertaking, must justify before the court, upon the return of the summons.

If the plaintiff has stated separately in his affidavit the value of one or more chattels, or classes of chattels, as prescribed in section ninety-eight of this act, the defendant may require a delivery of part of the property replevied, as prescribed in that section.

Notes to section 107.

This section is taken from section 1337 of the Consolidation Act (Laws 1882, chap. 410), which is the same as section 2925 of the Code

of Civil Procedure, applicable to justices' courts, and also from section 1704 of said Code.

Amendment of undertaking.— See notes to § 3, "Removal."

Description of property.— The effect of the recitals in the undertaking is not disturbed by this section giving defendant a right to a return of the property replevied, on giving a bond, although it be not the property described in the requisition. *Martin* v. *Gilbert*, 119 N. Y. 298. See *Auerbach* v. *Marks*, 12 Week. Dig. 155.

Exception to and justification of sureties.— By section 70 of this act sections 106 to 110 and sections 127 to 128, relating to undertakings, sureties, and justification, are made applicable.

Id.— By excepting to plaintiff's sureties the defendant waives his right to a return, although they fail to justify. *Cullen* v. *Miller*, 5 Abb. N. C. 282; *Hofheimer* v. *Campbell*, 59 N. Y. 269, affg. 7 Lans. 157. This latter decision is apparently overruled by section 1706 of the Code of Civil Procedure. See § 106 of this act.

Mistakes, omissions, defects, and irregularities in affidavit, and undertaking.— See notes to § 1, subd. 3, and § 96.

Undertakings.— Sections applicable as to. See §§ 70, 92, 106 to 110, 127, 128.

Where several chattels are to be replevied.— See § 98.

§ 108. **Qualifications of sureties.**— The qualifications of sureties, as required by this act, are as follows:

1. Each of them must be a resident of, and a householder or freeholder within the city of New York.

2. Each of them must be worth twice the sum specified for which they become obligated in the undertaking or order of arrest, exclusive of property exempt from execution.

3. A fidelity or surety company specifically authorized by law to act as surety.

Notes to section 108.

This section is taken from section 1338 of the Consolidation Act (Laws 1882, chap. 410), which was the same as section 2926 of the Code of Civil Procedure, applicable to justices' court. It is substantially the same as section 579 of said Code, with the provision as to fidelity and surety companies added. See also §§ 70 and 92, entitled "Sections applicable as to undertakings, et cetera," being §§ 106 to 110, and 127 and 128 of this act.

Disqualified sureties.— By rule 5 of the Supreme Court, attorneys are prohibited; attorneys' clerks are also disqualified. *Miles* v. *Clarke*, 4 Bosw. 632; *Kellog* v. *Herr*, 1 Law Bull. 93; *Wheeler* v. *Wilcox*, 7 Abb. 73.

The provisions of this rule as to attorneys do not apply to one who has relinquished the practice of law. *Stringham* v. *Stewart*, 8 Civ. Proc. Rep. 120; *Evans* v. *Harris*, 47 N. Y. Super. 366.

Sheriffs and their officers are disqualified. *Bailey* v. *Warden*, 20 Johns. 129.

It is necessary to except to them. *Miles* v. *Clark*, 4 Bosw. 632.

A freeholder is one who has title to real estate. *People* v. *Scott*, 8 Hun, 566; *People* v. *Hynds*, 30 N. Y. 470.

A householder for the purposes of bail may be one who occupies a portion of a building as an office. *Somerset & W. Sav. Bank* v. *Huyck*, 33 How. 323.

Public policy.— Agreement to go bail for a pecuniary consideration is not against public policy. *Fitch* v. *Vanderveer*, 6 Week. Dig. 243.

Nor where the bail is previously indemnified. *People* v. *Ingersoll*, 14 Abb. N. S. 23.

§ 109. **Justification.**—For the purpose of justification, each of the sureties or bail must attend before the court, at the time and place mentioned in the notice, provided in section one hundred and six of this act, and be examined on oath, touching his sufficiency, in such manner as the court, in its discretion, thinks proper. The court may, in its discretion, adjourn the examination, from day to day, until it is completed, but such an adjournment must always be to the next judicial day, unless by consent of parties. If required by the attorney for the adverse party, the examination must be reduced to writing, and subscribed by the bail or surety.

Notes to section 109.

This section is taken from section 1338 of the Consolidation Act (Laws 1882, chap. 410), which was the same as section 2926 of the Code of Civil Procedure, relative to justices' courts. It is substantially the same as section 580 of said Code. See also §§ 70 and 92, entitled "Sections applicable as to undertakings, et cetera," which are §§ 106 to 110 and 127, 128 of this act.

Section 106 refers to "Defendant, when to except to sureties, and proceedings thereupon."

Failure to justify, the sureties cease to be bail and cannot surrender their principal to relieve themselves from responsibility. *Haberstro* v. *Bedford*, 118 N. Y. 187, affg. 5 N. Y. St. Rep. 399.

Further time.— If the bail do not justify at the time fixed, further time may be allowed when cause shown, but new notice must be given. *Burns* v. *Robbins*, 1 Code Rep. 62; *Lewis* v. *Stevens*, 93 N. Y. 57.

Surety company.— Justification of a surety company, when sufficient. *Rosenwald* v. *Phœnix Ins. Co.*, 9 Civ. Proc. Rep. 444.

§ 110. **Allowance of undertaking.**— If the court finds the surety or bail sufficient, it must annex the examination to the undertaking, indorse its allowance thereon, and cause them to be filed with the clerk.

Notes to section 110.

This section is taken from section 1338 of the Consolidation Act (Laws 1882, chap. 410), which was the same as section 2926 of the Code of Civil Procedure, relative to justices' courts. It is substantially the same as section 581 of said Code. See also §§ 70 and 92, entitled "Sections applicable as to undertakings, et cetera," which are §§ 106 to 110, 127, and 128 of this act.

Amendment of undertaking.— See notes to § 3, "Removals."

Approval.— In replevin proceedings plaintiff's undertaking must be approved by the justice and not by the marshal. *Grotz* v. *Hussey*, 61 How. 448.

Rejection of one of the bail is a rejection of all unless further time be given by the court. *O'Neill* v. *Durkee*, 12 How. 94.

§ 111. **When and to whom marshal to deliver chattel.**— If the defendant neither excepts to the plaintiff's sureties, nor requires the return of the chattel, within the time prescribed for that purpose, or if he fails to procure the allowance of his undertaking, or if the plaintiff, after the defendant has excepted to his sureties, duly procures the allowance of his undertaking, the marshal must, except in the case specified in section one hundred and thirteen of this act, immediately deliver the chattel to the plaintiff. If the plaintiff, after the defendant has excepted to his sureties, fails to procure the allowance of his undertaking, or if the defendant after he has required the return of the chattel, procures the allowance of his undertaking, the marshal must immediately deliver the chattel to the defendant.

Note to section 111.

This section is substantially the same as section 1339 of the Consolidation Act (Laws 1882, chap. 410). Section 113 relates to claim of title by third person, and proceedings thereupon.

§ 112. **Penalty for wrong delivery by marshal.**— The marshal who delivers to either party, without the consent of the other, a chattel replevied by him, except as prescribed in the last section, or by virtue of an execution issued upon a judgment in the action, forfeits to the party aggrieved the sum of one hundred dollars, and is also liable to him for all damages which he sustains thereby.

Notes to section 112.

This section is the same as section 1340 of the Consolidation Act (Laws 1882, chap. 410), which was taken from section 2928 of the Code of Civil Procedure, relative to justices' courts. See §§ 113 and 114, and notes.

What should be alleged.— In an action for a penalty under this section (§ 2928, Code Civ. Proc.), it is not enough to allege merely that defendant's act in delivering certain property was "wrongful and unlawful;" facts should be stated showing that it was so. *Schroeder* v. *Becker*, 22 Week. Dig. 261.

§ 113. **Claim of title by third person; proceeding thereupon.** — At any time before the chattel which has been replevied is actually delivered to either party, if a person not a party to the action, claims as against the defendant a right to the possession thereof, existing at the time when it was replevied, an affidavit may be made and delivered to the marshal who executed the requisition, in his behalf, stating that he makes such claim, specifying the chattel or chattels, to which it relates, if two or more chattels have been replevied, and the claim relates only to part of them, and setting forth the facts upon which his right of possession depends. In that case, the marshal may, in his discretion, before he delivers the chattel to the plaintiff, serve upon the plaintiff's attorney, a copy of the affidavit with a notice that he requires indemnity against the claim. If the indemnity is not furnished within a reasonable time, after the plaintiff becomes entitled to the delivery of the chattel, the marshal may, in his discretion, deliver it to the claimant without incurring any liability to the plaintiff, by reason of so doing.

Notes to section 113.

This section is taken from section 1341 of the Consolidation Act (Laws 1882, chap. 410), and from section 1709 of the Code of Civil Procedure, and is substantially the same, substituting the word "marshal" for "sheriff." See also § 2929, Code Civ. Proc., relative to justices' courts, which is substantially the same.

Defendant's claim.— Formerly the defendant could not avail himself of the fact that a third party is entitled to the chattel, and it was held that section 723 of the Code of Civil Procedure did not apply to this court. See *Carswell* v. *Alden*, 12 Civ. Proc. Rep. 137; s. c., 6 N. Y. St. Rep. 297. This has been changed by section 116 of this act, which is the same as section 1723 of said Code.

Marshal.— As to proceedings of the marshal on claim by third person see *Manning* v. *Keenan*, 73 N. Y. 45, affg. 9 Hun, 686; *Lynch* v. *St. John*, 8 Daly, 142; *Second Nat. Bank* v. *Dunn*, 63 How. 434, 2 Civ. Proc. Rep. 259. Where, after property has been taken in replevin, defendant does not require its return upon giving an undertaking under section 1704, and no claim is made by a third person under section 1709, plaintiff is entitled to its possession, and an order of interpleader authorizing substitution for defendant of the claimant cannot be made. *Pelham Hod El. Co.* v. *Baggaley*, 12 N. Y. Supp. 218; s. c., 34 N. Y. St. Rep. 691.

§ 114. **Action against a marshal on claim.**— A person, not a party to the action, who has served an affidavit as prescribed in the last section, may maintain an action, against the marshal who has delivered the chattel to the plaintiff, to recover his damages, by reason of the taking, detention, or delivery of the chattel. But the summons in such an action must be issued within three months after the delivery of the chattel to the plaintiff, and must be served within three months after it is issued. An action cannot be maintained against a marshal by a person so entitled to make a claim, except as prescribed in this section.

Note to section 114.

This section is taken from section 1341 of the Consolidation Act (Laws 1882, chap. 410), and from section 1710 of the Code of Civil Procedure, and is substantially the same, substituting the word "marshal" for "sheriff." See also § 2929 of said Code, relative to justices' court. See *Manning* v. *Keenan*, 9 Hun. 686; affd., 73 N. Y. 45. And see *Haskins* v. *Kelly*, 1 Robt. 160, 1 Abb. N. S. 63; *Edgerton* v. *Ross*, 6 Abb. 189.

§ 115. **Indemnity to marshal against such action.**— The indemnity to be furnished to the marshal by the plaintiff, as prescribed in the last section but one, must consist of a written undertaking to him, in an amount at least double the actual value of the property claimed, executed by at least two sureties, or in a proper case by a fidelity or surety company, that they or it will indemnify him against any liability, for damages, costs or expenses, to be incurred in an action, brought against him, by reason of the taking or detention of the chattel, or its delivery to the plaintiff. Each of the sureties besides possessing the other qualifications required by law, must be a freeholder or householder in the city of New York. The marshal before delivering the chattel, may require the persons offered as sureties, to submit to an examination, before the court, out of which the proceedings issued. The sureties are entitled to be substituted as defendants, in an action, brought as prescribed in the last section, as if the chattel had been levied upon, by virtue of an execution.

Note to section 115.

This section is taken from section 1341 of the Consolidation Act (Laws 1882, chap. 410), and from section 1711 of the Code of Civil Procedure. See also § 2929 of said Code, relative to justices' courts.

§ 116. **Answer of title in third person.**— The defendant may, by answer, defend, on the ground that a third person was entitled to the chattel, without connecting himself with the latter's title.

Note to section 116.

This section is the same as section 1723 of the Code of Civil Procedure, which is now made applicable to this court, although formerly it was not so. See notes to § 113, "Defendants' claims."

§ 117. **Defendant may demand judgment for return of chattel.**— Where a chattel has been replevied, and the defendant has not required the return thereof, pending the action, as prescribed in the foregoing sections, he may, in his answer, demand judgment for the return thereof, either with or without damages for the taking, withholding, or detention.

Note to section 117.

This section is the same as section 1342 of the Consolidation Act (Laws 1882, chap. 410), which is the same as section 2930 of the Code of Civil Procedure, applicable to justices' courts.

§ 118. **For delivery of property; how money recovered by same judgment may be collected.**—An execution for the delivery of a chattel, must particularly describe the property and designate the party to whom the judgment awards possession thereof. It must require the marshal to deliver the possession of the property within the city of New York, to the party entitled thereto. If a sum of money is awarded by the same judgment, it may be collected by virtue of the same execution; or a separate execution may be issued for the collection thereof, omitting the direction to deliver possession of the property. If one execution is issued for both purposes, it must contain with respect to the money to be collected, the same directions as an execution against property, or against the person as the case requires.

Note to section 118.

This section is taken from section 1373 of the Code of Civil Procedure, and from section 1343 of the Consolidation Act (Laws 1882, chap. 410), which included this section of the Code. The word "marshal" is substituted for "sheriff," the reference to real property is excluded, and the words "The City of New York" is substituted for "County." See also § 124, "Execution; contents thereof," and *Van Rensselaer* v. *Wright*, 56 Hun, 39; *Hoffman* v. *Connor*, 76 N. Y. 121; affd., 13 Hun, 541.

§ 119. **Damages when chattel injured, et cetera, by defendant.**— Where the plaintiff recovers a chattel which was injured, or otherwise depreciated in value, while it was in the possession or under the control of the defendant, under such circumstances, that the plaintiff might recover damages for the injury or depreciation, in an action brought against the defendant therefor, he may recover the same damages, in an action brought as prescribed in this article. In that case he must set forth the facts in his complaint, and demand judgment for damages accordingly.

Notes to section 119.

This section is the same as section 1722 of the Code of Civil Procedure.

Complaint.— Where the plaintiff recovers a chattel which was injured, or otherwise depreciated in value, while it was in the possession or under the control of the defendant, under such circumstances that the plaintiff might recover damages for the injury or depreciation, in an action brought against the defendant therefor, he may recover the same damages in an action brought as prescribed in this article. In that case, he must set forth the facts in his complaint, and demand judgment for damages accordingly. See *Braekelee & Co.* v. *Schwabeland*, 86 Hun, 143; *Corn Ex. Bank* v. *Blye*, 56 Hun, 463.

Measure of damages for the detention of machines placed in a factory upon trial or approval is the interest on their value. *Redmond* v. *Am. Mfg. Co.*, 121 N. Y. 415; affd., 56 N. Y. Super. 372. See also 8 Abb. N. C. 368; *Barry* v. *Fisher*, 39 How. 521; *Smith* v. *Orser*, 43 Barb. 187.

Separate action.— Plaintiff, if he recovers the chattel, can maintain a separate action to recover damages for the taking or detention of the property. *Sinskie* v. *Brust*, 66 App. Div. 35.

§ 120. **Judgment or verdict; what to state.**— The judgment, verdict or decision, must fix the damages, if any, of the prevailing party.

1. Where it awards to the plaintiff a chattel, which has not been replevied, or where it awards to the prevailing party a chattel, which has been replevied, and afterwards delivered by the marshal to the unsuccessful party, or to a person not a party, it must also fix the value of the chattel, at the time of the trial.

2. In a case where the unsuccessful party had a special property therein, not equal to the full valuation of the chattel to fix the value of the special property.

Notes to section 120.

This section is taken from sections 1726 and 1727 of the Code of Civil Procedure, substituting the word "marshal" for "sheriff," and "judgment" for "report."

Judgment for plaintiffs, in an action to recover a chattel, should award to them the possession of the chattel, or the sum fixed as the value thereof, if possession cannot be obtained. *Lewin* v. *Towbin*, 31 Misc. Rep. 780.

The court cannot supply the omission where the verdict does not find the value. *Pakas* v. *Racy*, 13 Daly, 227.

The value of the property must be assessed and damages for its detention. *Phillips* v. *Melville*, 10 Hun, 211; *Button* v. *Chapin*, 7 Civ. Proc. Rep. 278.

The verdict, report, or decision must set forth the reason why the value of the chattel is not fixed. See *Claflin* v. *Davidson*, 53 N. Y. Super. 122; *Keeney* v. *Swan*, 2 N. Y. St. Rep. 214.

An action for the recovery of personal property in which no affidavit or requisition has been made, and the facts required by sections 1690, 1695, are not alleged, is not necessarily an action of replevin so as to require a verdict in the alternative, but a verdict for the value of the property may be rendered. *Wilsey* v. *Rooney*, 41 N. Y. St. Rep. 444, 16 N. Y. Supp. 471.

For final judgment under subdivision 2 of this section, see § 123.

§ 121. **Judgment or verdict, et cetera, for part of several chattels.**— Where the action is brought to recover two or more chattels, the judgment, verdict or decision, may award to one party, one or more distinct chattels, which can be identified, and set apart from the others, and the residue to the other party, and, if necessary, the complaint must be amended so as to conform thereto. The final judgment rendered thereupon, must award to each party the same relief, with respect to the finding in his favor, as if separate judgments were rendered, except that, where each party is entitled to an absolute award of a sum of money, against the other, the smaller sum must be deducted from the greater, and the balance only must be awarded.

Notes to section 121.

This section is new and taken from section 1728 of the Code of Civil Procedure, substituting the word "judgment" for "report." See *Woodburn* v. *Chamberlain*, 17 Barb. 446.

Costs.— This section has no bearing upon the question of costs. *Newell U. M. Co.* v. *Muxlow*, 115 N. Y. 170, 175; *Mertens* v. *Fitzwater*, 53 Hun, 597; *Ackerman* v. *O'Gorman*, 17 Civ. Proc. Rep. 275.

§ 122. **Damages; how ascertained on default.**— Where the plaintiff is entitled to judgment by default, for want of an appearance or pleading, the court to which he applies for judgment may ascertain and determine the damages to

which he is entitled and the value of the chattel, if necessary.

Note to section 122.

This section is the same as section 1729 of the Code of Civil Procedure, with the exception of the omission as to directing a reference or a writ of inquiry, as this court has no such power.

§ 123. **Final judgment, et cetera.**—Final judgment for the plaintiff must award to him possession of the chattel recovered by him, with his damages if any. If a chattel recovered was not replevied, or if after it was replevied it was delivered to the defendant, or to a person not a party, as prescribed in this act, the final judgment must also award to the plaintiff the sum fixed as the value thereof, to be paid by the defendant, if possession thereof is not delivered to the plaintiff. If the defendant has demanded judgment for the return of a chattel, which was replevied, and afterwards delivered to the plaintiff or to a person not a party, as prescribed in this act, final judgment in his favor therefor must award to him possession thereof, with his damages, if any, and it must also award to him the sum fixed as the value thereof; to be paid by the plaintiff, if possession is not delivered to the defendant. But if the case is one of those specified in subdivision two of section one hundred and twenty of this act, final judgment in favor of the defendant must award to him the sum fixed as therein specified, and if it is not collected, the delivery of the chattel, or, if the chattel has not been replevied, or has been returned to him after replevin, that he is entitled to the possession thereof, until the sum so awarded is collected, or otherwise paid.

Notes to section 123.

This section is taken from section 1730 of the Code of Civil Procedure, leaving out the part commencing "The judgment may be docketed," because the same is applicable only to courts of record.

Alternative judgment.— An omission to render judgment in the alternative in an action of replevin is an irregularity which may be cured by modification on appeal. *Wolf* v. *Farley*, 40 N. Y. St. Rep. 808. See *Lewisohn* v. *Apple*, 12 Civ. Proc. Rep. 274; *Boehm* v. *Blanchard*, 31 N. Y. St. Rep. 55, 9 N. Y. Supp. 396.

Dismissal of complaint.— Where plaintiff fails to make out a case in replevin, and defendant has not claimed title in himself, he is not entitled to a judgment of possession of the property and damages, but only to a dismissal of the complaint. *Nicols* v. *Potts*, 35 Misc. Rep. 273, 71 N. Y. Supp. 765.

Erroneous judgment.— Where judgment was rendered as follows: "Upon deposit by defendant Cohen in court of $17, together with $5.50, for the benefit of the plaintiffs, there will be judgment for the defendant for the return of the piano, with costs." *Held* erroneous as not in conformity with Code Civ. Proc., § 1730. *Fischer* v. *Cohen*, 22 Misc. Rep. 117.

§ 124. **Execution; contents thereof.**— An execution for the delivery of the possession of a chattel and to satisfy out of the property of the judgment debtor a sum of money contingently awarded against him, must contain, in addition to the other matters prescribed by law, the following direction:

1. Where the judgment awards a sum of money, if possession of the chattel is not delivered to the prevailing party, the execution must require the marshal if the chattel cannot be found within the city of New York, to satisfy the sum so awarded with interest and his fees, out of the property of the party against whom the judgment is rendered.

*A direction to satisfy a sum of money out of property, as prescribed in this section, must be in the form required by law for a like direction, where an execution against property is issued upon a judgment for a sum of money.

Note to section 124.

This section is taken from section 1731 of the Code of Civil Procedure, substituting the word "marshal" for "sheriff," and the "city of New York" for "his county." See also § 118, "For delivery of property; how money recovered by same judgment may be collected."

§ 125. **Marshal's power to take chattel.**— For the purpose of taking possession of a chattel, by virtue of such an execution, the powers of the marshal are the same as where he is required to replevy a chattel.

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* So in original; should be "2."

Note to section 125.

This section is the same as section 1732 of the Code of Civil Procedure, except that the word "marshal" is substituted for "sheriff." See *Hoffman* v. *O'Connor*, 76 N. Y. 121, affg. 13 Hun, 541.

§ 126. **Action on undertaking; when maintainable.**— A plaintiff who has recovered a final judgment cannot maintain an action against the sureties in an undertaking given in behalf of the defendant to procure a return of the chattel or against the bail of a defendant who has been arrested, until after the return, wholly or partly unsatisfied or unexecuted, of an execution in his favor, for the delivery of the possession of the chattel, or to satisfy a sum of money out of the property of the defendant, or for both purposes, as the case requires. A defendant who has recovered a final judgment cannot maintain an action against the sureties in the plaintiff's undertaking, given to procure a replevin until after a like return of similar execution against the plaintiff.

Note to section 126.

This section is the same as section 1733 of the Code of Civil Procedure. See § 1, subd. 3, and notes, and *Diossy* v. *Morgan*, 74 N. Y. 11; *Harrison* v. *Wilkin*, 78 N. Y. 390; *Loaners' Bank* v. *Jacoby*, 10 Hun, 143; *Jagger* v. *Lallance*, 8 Daly, 251.

§ 127. **Marshal's return; evidence therein.**— In such an action against the sureties, the marshal's return to the execution is presumptive evidence of a failure to deliver or to return a chattel, or to pay a sum of money, according to the terms of the undertaking.

Note to section 127.

This section is the same as section 1734 of the Code of Civil Procedure, except that the word "marshal" has been substituted for "sheriff."

§ 128. **Injury, et cetera, no defence.**— It is not a defence to such an action, that the chattel was injured or destroyed, after it was replevied, unless the injury or destruction was affected by the act, or with the consent of the plaintiff, in

the action, or occurred after the chattel was taken by virtue of the execution.

Note to section 128.

This section is the same as section 1735 of the Code of Civil Procedure, and follows the case of *Jenkins* v. *Suydam*, 3 Sandf. 614.

§ 129. **Proceeding where summons not personally served.**— Where the defendant does not appear, and the summons has not been personally served upon him, and a chattel, or a part of a chattel, to recover which the action is brought, has been replevied, and the proceedings thereupon have been duly taken, as prescribed in this act, the court must proceed to hear and determine the action with respect to that chattel, or part of a chattel, or, if the action is brought to recover two or more chattels, with respect to those which have been replevied, in like manner and with the like effect as if the summons had been personally served.

Note to section 129.

This section is the same as section 1344 of the Consolidation Act (Laws 1882, chap. 410), which is the same as section 2932 of the Code of Civil Procedure, relating to justices' courts.

§ 130. **When action not affected by failure to replevy.**— Where the summons has been personally served upon the defendant, or where he appears, the court must proceed to hear and determine the action, although the plaintiff has not required the chattel to be replevied, or the marshal has not been able to replevy it.

Notes to section 130.

This section is the same as section 1345 of the Consolidation Act (Laws 1882, chap. 410), and is the same as section 2933 of the Code of Civil Procedure, relating to justices' courts, substituting the word "marshal" for "constable."

No requisition.— An action to recover a chattel may be maintained, although there has been no requisition. *Guyon* v. *Rooney*, 25 N. Y. St. Rep. 326; *Irr* v. *Schroeder*, 6 Civ. Proc. Rep. 253; *Devlin* v. *Stohl*, 2 Civ. Proc. Rep. 222.

§ 131. **Joinder of action with others.**— Nothing in this title is to be so construed as to prevent the plaintiff from uniting in the same complaint two or more causes of action, in any case specified in section one hundred and forty-six of this act.

Notes to section 131.

This section is substantially the same as section 1689 of the Code of Civil Procedure.

Section 146 refers to "What causes of action may be joined in the same complaint," and subdivision 3, "Chattels with or without damages for the taking or detention thereof."

NOTE.— There are no sections from 131 to 137.

ARTICLE IV.

Action to Foreclose a Lien on a Chattel.

SECTION 137. Action; when and in what courts maintainable.
138. Warrant in action.*
139. Action on conditional sale agreement, et cetera; how brought.
140. Judgment; order of arrest; body execution.
141. Judgment, et cetera.
142. Application of this article.

§ 137. **Action; when and in what courts maintainable.**— An action may be maintained in the municipal court of the city of New York, to foreclose a lien upon a chattel, for a sum of money, where the amount claimed, exclusive of costs, does not exceed five hundred dollars, in any case where such a lien exists at the time of the commencement of the action.

Notes to section 137.

This section is taken from section 1737 of the Code of Civil Procedure. The subject-matter follows the same as in actions in the Supreme Court.

This section is substantially the same as already contained in section 1, "Jurisdiction," subdivision 10. See notes under that section.

The proper mode of enforcing a common-law lien against chattels was discussed by Judges Brady and Daly in *Trust* v. *Pierson*, 1 Hilt. 292,

* So in original; should be "for." See § 138.

from which can be seen the difficulty had in enforcing or satisfying a lien upon chattels.

Sections 137 to 142 have regulated and made plain the remedy.

§ 138. **Warrant in action for.**— In an action to foreclose a lien upon a chattel, if the plaintiff is not in possession of the chattel, a warrant, commanding the marshal to seize the chattel, and safely keep it to abide the judgment, may be issued in like manner, as a warrant of attachment may be issued, in an action founded upon a contract, and the provisions of law applicable to a warrant of attachment, issued out of the court apply to a warrant issued as prescribed in this act, and to the proceedings to procure it, and after it has been issued, except as otherwise specified in the judgment.

Note to section 138.

The first half of this section is taken from section 1330 of the Consolidation Act (Laws 1882, chap. 410), which is taken from section 1740 of the Code of Civil Procedure; the rest of section 1330 is substantially enacted into section 141 of this act.

§ 139. **Action on conditional sale agreement, et cetera; how brought.**— No action shall be maintained in this court, which arises on a written contract of conditional sale of personal property; a hiring of personal property, where title is not to vest in the person hiring until payment of a certain sum; or a chattel mortgage made to secure the purchase price of chattels; except, an action to foreclose the lien, as provided in this article. For the purpose of this section an instrument in writing as above stated shall be deemed a lien upon a chattel. Provided, however, that an action may be maintained to recover a sum or sums due and payable for instalment, payment or hiring, but in such cases no order of arrest shall issue.

Notes to section 139.

This section is new. It regulates the enforcement of a lien by action in this court, while, by section 142 of this act, it does not interfere with the provisions of Laws 1897, chapter 418, sections 80 to 85, for the enforcement of the lien by a sale of the property and prohibits an

order of arrest to issue in such an action. Section 140 of this act however provides that in a case of willful or malicious disposal of, or concealment of, the property, an order of arrest may be granted.

Conditional vendor and vendee.— The former means the person contracting to sell goods upon condition that the ownership thereof is to remain in such person until such goods and chattels are fully paid for or until the occurrence of any future event or contingency; the term "conditional vendee," when so used, means the person to whom such goods and chattels are so sold. Laws 1897, chap. 418, § 110.

Conditions and reservations in contracts for sale of goods and chattels are void as against subsequent purchasers, pledgees, or mortgagees in good faith, and as to them the sale shall be deemed absolute, unless such contract of sale, or a true copy thereof, are filed. Laws 1897, chap. 418, § 112. By section 115 certain articles are excluded, such as law books, pianos, organs, safes, etc. See *Ryan* v. *Wallowitz*, 25 Misc. Rep. 498; *Rodney, etc.* v. *Stewart*, 57 Hun, 545; *Grant* v. *Griffith*, 39 App. Div. 107; *Hopkins* v. *Davis*, 23 App. Div. 235.

§ 140. **Judgment; order of arrest; body execution.**— In an action of foreclosure, as provided in the last section, the plaintiff may allege that the defendant wilfully or maliciously disposed of or concealed the property or a part thereof, covered by the instrument on which suit is instituted, in which case the court may grant an order of arrest in the manner provided in article one of this title, and upon such allegation being proved on the trial, execution against the person shall issue, if the provisions of this act relating to indorsement upon the summons have been complied with, unless the property awarded by the judgment is produced by the defendant to satisfy the execution and levy, when made as provided in this article.

Upon judgment being rendered, as prescribed in this article under the provisions of this or the last preceding section, and execution issuing thereon, the property subject to levy must be produced or possession made readily available at the time of such levy, to satisfy the execution in the manner prescribed in the judgment, and on failure so to do, an execution against the person shall issue, provided the provisions of this act relating to indorsement upon the summons have been complied with, on the return of the marshal having the execution made to the clerk of the court in the

district in which the judgment is docketed, to the effect that such property is not available for levy and execution.

Notes to section 140.

This section is new. See also § 271 and § 275, as to "body executions."

Conversion; boarding-house-keeper's lien; judgment.— An action to enforce a boarding-house-keeper's lien upon property of a boarder which he has clandestinely removed is one for conversion of personal property within the meaning of subdivision 2 of section 2895 of the Code, and the justice is bound to insert in the judgment the liability of the defendant to arrest upon execution. *Babcock* v. *Smith*, 47 N. Y. St. Rep. 118; s. c., 19 N. Y. Supp. 817.

§ 141. **Judgment, et cetera.**— In an action to foreclose a lien, the final judgment in favor of the plaintiff, must specify the amount of the lien, and direct a sale of the chattel to satisfy the same and the costs, if any, by a marshal, in like manner, as where a marshal sells personal property by virtue of an execution, and the application by him of the proceeds of the sale, less his fees and expenses, to the payment of the amount of the lien, and the costs of the action. It must also provide for the payment of the surplus to the owner of the chattel, and for the safe keeping of the surplus, if necessary, by the clerk of the court, until it is claimed by him. If a defendant upon whom the summons is personally served, is liable for the amount of the lien, or for any part thereof, it may also award payment accordingly.

Note to section 141.

This section is taken from the latter part of section 1330 of the Consolidation Act (Laws 1882, chap. 410), which made section 1739 of the Code of Civil Procedure applicable to this court. It is also taken from section 1740 of said Code.

§ 142. **Application of this article.**— This title does not affect any existing right or remedy to foreclose or satisfy a lien upon a chattel, without action, and it does not apply to a case, where another mode of enforcing a lien upon a chattel is specially prescribed by law.

Notes to section 142.

This section is the same as section 1741 of the Code of Civil Procedure.

Enforcement of liens on personal property.— See Laws 1897, chap. 418, §§ 80 to 85, an act in relation to liens, constituting chapter 49 of the General Laws, does not preclude any other remedy by action to enforce a lien against personal property.

NOTE.— There are no sections 143 or 144.

TITLE IV.

Pleadings.

SECTION 145. Pleadings on joinder of issue.
146. What causes of action may be joined in the same complaint.
147. Plaintiff to prove his case,— except on contract where there is a verified complaint.
148. Defendant may offer to allow judgment or compromise.
149. Complaint.
150. Answer; what to contain.
151. Counterclaim defined.
152. Rules respecting the allowance of counterclaim.
153. Judgment when demand or counterclaim are equal, or unequal.
154. For affirmative relief.
155. Counterclaim when defendant is sued in a representative capacity.
156. When plaintiff is an executor or administrator.
157. Counterclaim where amount is in excess of courts' jurisdiction.
158. When defendant may demur.
159. Demurrer to complaint must specify grounds of objection.
160. Demurrer to all or part of the complaint; may answer to part.
161. Formal reply or demurrer to counterclaim not necessary.
162. When plaintiff may demur to answer.
163. Requirements concerning verified pleadings.
164. Verification; how and by whom made.
165. Exhibition of accounts at instance of adverse party may be ordered
166. Amendment of pleadings.
167. Private statute; how pleaded.
168. Judgments; how pleaded.
169. Conditions precedent; how pleaded.

SECTION 170. Pleadings to be liberally construed.
171. Immaterial variance in pleading to be disregarded.
172. Material variances; how provided for.
173. What to be deemed a failure of proof.
174. Partial defenses.
175. Complaint in actions by or against corporations.
176. When proof of corporate existence unnecessary.
177. Misnomer, when waived.
178. Pleadings in actions on bastardy bonds.
179. Answer of title.
180. Defendant in answer of title to deliver undertaking.
181. New action to be brought in supreme court.
182. Old action; thereupon discontinued.
183. Penalty for failure to deliver undertaking.
184. Title appearing from plaintiff's own showing.
185. Same cause of action, and defense in new action.
186. Answer of title interposed as to only one or more of several defenses; proceedings thereupon.
187. Interpleader by order in certain cases.

§ 145. **Pleading on joinder of issue.**— Pleadings in the municipal court of the city of New York, may be oral or written, verified or unverified, and include a complaint, answer or demurrer.

1. Where the action is commenced by the service of a summons only, the pleadings may be oral, and the substance thereof shall be endorsed upon the summons and entered in the docket book of the court. Issue must be joined on the return day of the summons, except as otherwise expressly prescribed in this act. The court may, however, in its discretion, order a written bill of particulars, with or without verification, to be filed by the plaintiff, or by the defendant interposing a counterclaim.

2. In all cases where a written complaint, verified or unverified, is served with the summons, a written answer, verified if the complaint be verified, or a written demurrer, must be filed and issue joined on the return day, except as otherwise expressly prescribed in this act, unless the court further extends the time to answer or demur.

3. Where a demurrer is interposed and disallowed, the court must, notwithstanding the return day has passed, grant leave to plead as if no demurrer had been interposed,

with or without costs, in an amount within the sum allowed as costs in the action; but the time to file said pleading shall not be extended longer than eight days from the time the decision on the demurrer is rendered, unless on the consent of the parties.

4. If the court deems the demurrer well founded, it must permit the pleading to be amended; and if the party fails so to amend, the defective pleading or part of a pleading demurred to must be disregarded; and the court may, in its discretion, extend the time for pleading, in the manner prescribed in the preceding subdivision.

5. Where, on the return day of a summons, a person appears specially for the purpose of raising a question not involving the merits of the action, the court may, in its discretion, reserve the decision on the question raised and extend the time to plead, in the manner prescribed in subdivision three of this section.

6. Nothing herein shall be construed to prevent the court ordering a bill of particulars in a proper case, whether the pleadings be written or oral.

Notes to section 145.

This section is new and is made up mainly from section 1346 of the Consolidation Act (Laws 1882, chap. 410), which is derived from section 3207 of the Code of Civil Procedure, and which latter section made section 3126 of said Code applicable to this court. This section is also made up from the numerous sections mentioned in section 1347 of the Consolidation Act, which made section 2940 of Code of Civil Procedure, entitled "General rules of pleading," which applies to justices' courts, applicable to this court. The provision as to indorsement of the summons and entry in the docket in subdivision 1 is taken from section 2938 of said Code, applicable to justices' courts.

It will be observed that while sections 150 to 158 make provisions for a counterclaim by the defendant, there is no provision for a reply contained in the preamble of this section, which mentions pleadings in this court omitting a reply. Section 161 expressly declares, "A formal reply to a counterclaim is not necessary," and that it shall be deemed to be denied by the plaintiff. This is in accordance with *Clinchy* v. *Apgar*, 16 Misc. Rep. 374, where it was held a reply to a counterclaim in this court is not required.

Pleadings to be in English; abbreviations.— See Code Civ. Proc., § 22.

Pleading, what is.— Pleading is the statement in the logical and legal form of the facts which constitute the plaintiff's cause of action,

or the defendant's ground of defense; it is the formal mode of alleging on the record that which would be the support or the defense of the party in evidence. *Crane* v. *Hardman*, 4 E. D. Smith, 448.

Construction.— In matter of substance a pleading of doubtful meaning must be construed most strongly against the pleader. *Browne* v. *Empire Type-Setting Machine Co.*, 44 App. Div. 598. See also *Booz* v. *Cleveland T. F. Co.*, 45 App. Div. 593, 61 N. Y. Supp. 407.

In this court pleadings are not necessarily so detailed and precise as required in the other courts. Matters of substance, stated in general terms and aided by a bill of particulars, which fully apprise the defendant of what is claimed, will generally suffice, when no objection is made that the complaint lacks particularity. *Crane* v. *Hardman*, 4 E. D. Smith, 448.

Great latitude is allowed in pleadings in this court, and they are liberally construed. *Ross* v. *Hamilton*, 3 Barb. 609.

The court will give a liberal construction to pleadings, even on demurrer. *Ketteltas* v. *Meyers*, 19 N. Y. 231; *Blackman* v. *Thomas*, 28 N. Y. 67; *Allen* v. *Paterson*, 7 N. Y. 476.

A liberal interpretation might be given to pleadings to sustain verdicts and judgments, when parties have not been misled or injustice done. *Graves* v. *White*, 59 N. Y. 156.

Answers are liberally construed in favor of counterclaims. *Hackford* v. *N. Y. C. R. R. Co.*, 6 Lans. 380.

Bill of particulars.— By subdivision 1 of this section the court may order a written bill of particulars as there specified, and by subdivision 6, the court may order a bill of particulars in any proper case whether the pleadings be written or oral. By section 165, "*Exhibition of accounts at instance of adverse party*," *may be ordered.*

Bills of particulars are of two kinds; one appertains to an account between parties, the other to a claim of one party. The rules governing the right to one or the other are different. *Giles* v. *Betz*, 15 Abb. Pr. 285, refers to the latter; *Williams* v. *Shaw*, 4 Abb. Pr. 209, to the former.

They are appropriate in all descriptions of actions where the circumstances are such that justice demands that a party should be apprised of the matters for which he is to be put to trial, with greater particularity than is required by the rules of pleading, and the principle upon which such orders are granted is the advancement of justice and the preventing of surprise at the trial. *Tilton* v. *Beecher*, 59 N. Y. 176.

Amendment.— A justice of this court may allow an amendment of the bill of particulars at the trial. *Dermody* v. *Flesher*, 22 Misc. Rep. 348; s. c., 49 N. Y. Supp. 150.

Conversion of personal property.— A bill of particulars will be ordered in such cases. *Humphrey* v. *Cortelyou*, 4 Cow. 54; *Robinson* v. *Conner*,

13 Hun, 291. The requisites thereof. *Schile* v. *Brokhahne*, 41 N. Y. Super. (J. & S.) 353.

Effect is to limit the testimony to the items contained in the bill, and to prevent the introduction of proof of any matters not so contained. *Kriess* v. *Seligman*, 8 Barb. 439; s. c., 5 How. 425.

Form.— The bill of particulars need not be in any particular form. *Williams* v. *Allen*, 7 Cow. 316. It need not state the names of the parties to the action. *Gage* v. *Carey*, 9 Cow. 44.

The date of each transaction should be stated as accurately as possible. If the precise day is not remembered, the month or year must be given. *Humphrey* v. *Cortelyou*, 4 Cow. 54; *Kellogg* v. *Paine*, 8 How. 329. The time stated is material in a bill of particulars. *Quin* v. *Astor*, 2 Wend. 577; *Moran* v. *Morrissy*, 28 How. 100; *Schile* v. *Brokhahne*, 41 N. Y. Super. (J. & S.) 353.

Knowledge.— A bill of particulars will not be ordered where the items are better known to the party applying for it than to the other party. *Young* v. *De Mott*, 1 Barb. 30, 4 Abb. Pr. 209, 15 Johns. 222; *Power* v. *Hughes*, 39 N. Y. Super. (7 J. & S.) 482.

Non-compliance.— An order should be made by the justice, precluding the party not furnishing the bill of particulars, or account, from giving evidence or proof thereof, before the trial commences. *Kellogg* v. *Paine*, 8 How. 329.

Object of a bill of particulars is that the other party should not be taken by surprise from the generalities of the pleadings and come to trial unprepared as to the nature of plaintiff's claim. *Stevens* v. *Weob*, 12 Daly, 88; *Dwight* v. *Germania Ins. Co.*, 84 N. Y. 493.

Special contract.— It will not be granted in an action by an attorney for fees claimed under special contract. *Stillwell* v. *Hernandez*, 7 Daly, 485.

Variance between proof and bill.— As the object of a bill of particulars is to prevent a surprise on the trial, a variance between the proof and the bill will be disregarded, if the adverse party has not been misled. Thus, if the bill of particulars has advised the adverse party of the evidence which is to be offered, so that there can be no mistake as to the preparation to be made to resist the claim, the court will not permit the party furnishing the bill to be prejudiced by a variance between the bill and the proof. *Smith* v. *Hicks*, 5 Wend. 48; *Dubois* v. *Delaware Canal Co.*, 12 Wend. 334; *Seaman* v. *Lord*, 4 Bosw. 337.

For full notes and cases, in fact a "*brief*," on bills of particulars, the student and practitioner is referred to 2 Civ. Code Rep. 240, etc.

Reply.— There is no provision for a reply to a counterclaim in this act. See note to this section *above*, and § 161.

Service of pleading.— Where last day falls on Saturday half holiday service may be made on Monday. *Reynolds* v. *Palen*, 20 Abb. N. C. 11. Compare *Nichols* v. *Kelsey*, 20 Abb. N. C. 14.

Verification.— Where the amended complaint is verified the amended answer must also be verified, and where it is not, judgment may be entered thereon. *Thum* v. *Iserman*, 25 Misc. Rep. 793, 54 N. Y. Supp. (88 St. Rep.) 559.

Unverified answer; motion to dismiss complaint.— Although defendant does not serve a verified answer, he may move to dismiss the complaint, as not stating a cause of action, and such motion is treated as a demurrer. *Morris* v. *Hunken*, 40 App. Div. 129, 57 N. Y. Supp. 712.

§ 146. **What causes of action may be joined in the same complaint.**— The plaintiff may unite in the same complaint, two or more causes of action, where they are brought to recover as follows:

Notes to section 146.

This section is made up from sections 484 and 2937 of the Code of Civil Procedure. The first relates to causes of action that may be joined in the Supreme Court, the second to those in justices' courts.

The preamble is substantially the same as section 484 of said Code. Subdivision 1 is the same as subdivision 1 of that section and the same as subdivision 2 of section 2937 of said Code.

Subdivision 2 is the same as subdivision 3 of said section 2937.

Subdivision 3 is the same as subdivision 7 of said section 484.

Subdivision 4 is the same as subdivision 8 of said section 484.

Subdivision 5 is the same as subdivision 9 of said section 484.

Subdivision 6 is substantially the same as subdivision 10 of section 484.

The rest of section 146, under consideration, is taken from the rest of sections 484 and 2937 of the said Code, both being similar.

Causes of action to be separately stated and numbered.— Where the complaint sets forth two or more causes of action, the statement of the facts constituting each cause of action must be separate and numbered. Code Civ. Proc., § 483.

Parties who may be joined.— See § 42.

Application of this article to defendants jointly liable.— See § 43. There is no "article," it is included in title II, "Actions; Summons; Parties," which contains no articles.

1. Upon contract, express or implied.

Notes to section 146, subdivision 1.

Administratrix and individually.— There may be united in the same complaint by an administratrix an indebtedness to her as adminis-

tratrix under contract by intestate, and one on contract with herself as administratrix. *Valleau* v. *Cahill*, 1 City Ct. Rep. 47.

Breach of bond and assignment.— A complaint alleging the giving by W. & K. of a bond for the performance of a contract, on which Purvis was surety, and a breach of the condition thereof, and also alleging that W. assigned his interest to K., and was released, and that Purvis assented to the assignment and agreed that his obligation as surety should continue to be the same for K. as it was for W. & K., states but one cause of action, viz.: For breach of the bond. *Lehnen* v. *Purvis*, 29 N. Y. St. Rep. 779, 55 Hun, 535.

Contract and tort.— Cannot be united. *Raynor* v. *Brannan*, 40 Hun, 60. See, however, *Grimshaw* v. *Woodfall*, 15 N. Y. Supp. 857, 48 N. Y. St. Rep. 299; *Hawkes* v. *Burke*, 34 Misc. Rep. 189.

Conversion and freight.— A claim for damages for loss or conversion of goods by a carrier, and to recover an excess of freight paid, may be united. *Adams* v. *Bissell*, 28 Barb. 382.

Money lent and fraud.— A count for money lent, another for services, and a third alleging fraud in inducing the payment of the money, and the rendering of the services is no misjoinder. *Campbell* v. *Wright*, 21 How. 9; *Roth* v. *Palmer*, 27 Barb. 652.

Parties.— Causes of action on different contracts cannot be joined in the same action, unless all parties are affected by each. *Nichols* v. *Drew*, 19 Hun, 490.

Promissory note and collateral.— A cause of action at law on a promissory note, and one for the foreclosure of the plaintiff's lien upon security deposited as collateral to such note, may be united. *Farmers & Mechanics' Nat. Bank of Buffalo* v. *Rogers*, 17 N. Y. St. Rep. 381.

Several breaches.— Several breaches of one contract, although they relate to different portions of the contract, may be set forth in one complaint as different causes of action. *Madge* v. *Puig*, 12 Hun, 15.

Special damages.— An allegation setting up special damages arising from the breach of contract sued for does not constitute a separate cause of action. *McKesson* v. *Russian Co.*, 27 Misc. Rep. 96, 57 N. Y. Supp. (91 St. Rep.) 599.

2. For personal injuries, and injuries to property, or either.

Notes to section 146, subdivision 2.

Injuries to personal property and fraud.— Causes of action for injuries to personal property, one for conversion of personal property may be united with one for false and fraudulent representations, inducing plaintiff to execute a bond and mortgage on his real estate, to secure its payment in favor of a third person, to whom defendant delivered them for a consideration. *De Silver* v. *Holden*, 50 N. Y. Super. 236, 6 Civ. Proc. Rep. 121.

Negligence and conversion.— A count for injury to a horse by excessive driving is properly joined with a count for conversion of a horse. *Summerville* v. *Metcalf*, 15 Week. Dig. 154.

Counterclaim.— Causes of action for injuries to person and to property can be united in one counterclaim. *Heigel* v. *Willis*, 20 N. Y. St. Rep. 639, 50 Hun, 588.

3. Chattels, with or without damages, for the taking or detention thereof.

Note to section 146, subdivision 3.

Replevin.— By section 131 of this act, "article III, replevin," §§ 95 to 131, cause of action for replevin may be united with any other cause of action specified in section 146 of this act.

4. Upon claims against a trustee, by virtue of a contract, or by operation of law.

5. Upon claims arising out of the same transaction or transactions connected with the same subject of action, and not included within one of the foregoing subdivisions of this section.

6. For penalties incurred under a statute of the state, or an ordinance of the city of New York.

But it must appear, upon the face of the complaint, that all the causes of action, so united, belong to one of the foregoing subdivisions of this section; that they are consistent with each other; that they require the same judgment; and except as otherwise prescribed by law, that they affect all the parties. Where a cause of action for which a defendant might be arrested is united with a cause of action for which he cannot be arrested, an execution against the person of the defendant cannot be issued upon the judgment.

Notes to section 146, subdivision 5.

Same transaction.— Causes of action belonging to different subdivisions may be united in same complaint, if they arise out of the same transaction. *Polley* v. *Wilkisson*, 5 Civ. Proc. Rep. 135. See *Sullivan* v. *N. Y., N. H. & H. R. R. Co.*, 1 Civ. Proc. Rep. 285.

Two causes of action cannot be considered as arising out of the same transaction, merely because the same act renders the defendants

liable in both. *Taylor* v. *Metropolitan El. R. R. Co.*, 52 N. Y. Super. 299.

Injuries to the person and to the property of plaintiff by the same tort are "claims arising out of the same transaction," which may be united in the same complaint. *Rosenbery* v. *Staten Island Ry. Co.*, 14 N. Y. Supp. 476.

A complaint alleged that the defendant, for a valuable consideration, agreed with the plaintiffs to carry from Detroit to Rochester certain trunks, but that the defendant so negligently carried such property that the same was lost and not delivered to the plaintiffs. A demurrer was interposed upon the ground that two causes of action, one on contract and the other for injuries to personal property, had been improperly joined. *Held*, that but one cause of action was stated — negligence of the defendant; and that in any event the causes of action arose out of the same transaction, and the facts might be alleged. *Rothschild* v. *The G. T. R. R. Co.*, 38 N. Y. St. Rep. 869.

Causes of action must affect all parties.— The causes of action to be joined must be in favor of all the plaintiffs, and against all the defendants, and must belong to the same class. *Enos* v. *Thomas*, 4 How. 48.

But it is not necessary that various causes of action in one complaint should affect all the parties equally. *Vermeule* v. *Beck*, 15 How. 333; *Earle* v. *Scott*, 50 How. 506. See *Van Wagenen* v. *Kemp*, 7 Hun, 328.

To justify the joinder of two or more causes of action in the same complaint, all the causes of action must affect all the defendants; and if, in an action against two, one of the causes of action affects only one of the defendants, a demurrer will lie. It is no answer to the demurrer that the statements of the two causes of action are intermingled, instead of being separate. *Kelly* v. *Newman*, 62 How. 156.

§ 147. **Plaintiff to prove his case, except on contract where there is a verified complaint.**— If a defendant fails to appear and answer, the plaintiff cannot recover without proving his case, except that where the action is on a contract, express or implied, and a copy of a verified complaint was served on defendant at the time of the service of the summons, judgment may be taken as demanded without further proof.

Notes to section 147.

This section is taken from section 2891 of the Code of Civil Procedure relating to justices' courts. Section 1347 of the Consolidation Act (Laws 1882, chap. 410), makes said section of the Code applicable, and was constructed from Laws 1857, chap. 344, § 48.

This section is in accordance with the decisions in the cases of *Hurry* v. *Coffin*, 2 Civ. Proc. Rep. 319; *Vorzimer* v. *Shapiro*, 6 Misc. Rep. 143; s. c., 55 St. Rep. 693, and 26 N. Y. Supp. 53; *Whitman* v. *Hamilton*, 27 Misc. Rep. 198, 57 N. Y. Supp. 760.

Action to foreclose a lien upon a chattel, the judgment must specify as provided in section 141, and is to be enforced as provided in section 140.

Adjournment; default.— The court, having adjourned the cause from the return day, has no power to render judgment in the interim as upon defendant's default in answering. *Whitman, etc.* v. *Hamilton*, 27 Misc. Rep. 198, 57 N. Y. Supp. 760.

Alias summons; return of marshal.— An alias summons cannot properly be issued by the clerk, except upon a return or affidavit by the marshal that he could not find the defendant so as to serve him with the first summons, and a judgment founded on an alias summons issued without such return or affidavit is void. *Loeb* v. *Smith*, 24 Misc. Rep. 200, 52 N. Y. Supp. 677.

Indorsement upon the summons.— Judgment and execution against the person can only be had if the provisions of this act relating to indorsement upon the summons (§§ 38, 39) has been complied with. See § 140.

Attorney.— Service of summons and complaint on defendant's attorney, not followed by appearance on the return day, gives no jurisdiction, and judgment thereupon entered as by default is void. *Goldberg* v. *Fowler*, 29 Misc. Rep. 328.

Deceit.— Judgment in an action for deceit upon a written complaint without proof is unauthorized and improper. *Vorzimer* v. *Shapiro*, 26 N. Y. Supp. 53.

Mechanic's lien.— Proceedings on return of summons. Judgment by default. See § 3406, Code Civ. Proc.

No verified complaint having been served with the summons, plaintiff must prove the case to take judgment. *Whitman, etc.* v. *Hamilton*, 27 Misc. Rep. 198, 55 N. Y. Supp. 760; *Wallot* v. *Weber*, 30 Misc. Rep. 632, 62 N. Y. Supp. 756.

Unauthorized.— The summons issued was not in the proper name of the defendant, nor stated that the name was a fictitious one; defendant did not appear personally, but his wife, an ignorant foreigner, was present on the return day apparently to explain that he was ill, as in fact he was. *Held*, that she could not be regarded as his agent under section 1294 of the Consolidation Act, and an amendment of the summons was irregular and did not justify entry of a judgment by default against defendant in his proper name. *Stromberg* v. *Carnese*, 35 Misc. Rep. 289, 71 N. Y. Supp. 746.

Omission to plead is not an admission of plaintiff's demand, he must establish it by testimony the same as if issue had been joined. *Blair* v. *Bartlett*, 75 N. Y. 150.

§ 148. **Defendant may offer to allow judgment or compromise.**— The defendant may, upon the return of the summons, and before answering, file with the court a written offer to allow judgment to be taken against him for a sum of money, or for property therein specified, with costs. If there are two or more defendants, and the action can be severed, a like offer may be made by one or more of the defendants, against whom a separate judgment may be taken. If the plaintiff thereupon, before taking any other proceeding in the action, files with the court a written acceptance of the offer, the court must render judgment accordingly. If an acceptance is not filed, the offer cannot be given in evidence upon the trial; but, if the plaintiff fails to obtain a more favorable judgment, he cannot recover costs from the time of the offer, and must pay the defendant's costs from that time. But a defendant may instead of such written offer, deposit the amount of his offer, if a sum of money, with the clerk of the court, with like effect.

Notes to section 148.

This section is taken from section 2892 of the Code of Civil Procedure, applicable to justices' courts, which was made applicable to this court by section 1347 of the Consolidation Act (Laws 1882, chap. 410), and contains a provision excepting an action to recover a chattel. This has been omitted from the present section, making it accord with section 738 of the Code of Civil Procedure, applicable to courts of record, thus permitting an offer to allow judgment to be taken "for property *therein* specified." The word "therein" however refers to the "summons," as expressed in this section, which never specifies property, and doubtless the complaint or an affidavit for replevin is implied. The provision at the end of the section allowing a deposit of a sum of money with the clerk is new, and is taken from section 732 of the Code of Civil Procedure, applicable to courts of record. Heretofore there was no provision authorizing a tender or deposit after suit brought. See *Ellenstein* v. *Klee*, 12 Misc. Rep. 112.

When offer may be made.— The words "upon the return of the summons and before answering" do not limit the authority to the return day specified in the process, but it may be exercised immediately after the service and actual return thereof. *Fowler* v. *Haynes*, 91 N. Y. 346.

Removal and appeal.— As to effect of offer in the court below after a removal on appeal, see *Mock* v. *Saile*, 52 Hun, 198, 23 N. Y. St. Rep. 307, 17 Civ. Proc. Rep. 121.

Oral acceptance.— In the case of *Beecher* v. *Kendall*, 14 Hun, 327, an oral acceptance of the written offer to allow judgment before the judgment entered upon his docket was held sufficient.

Offer to pay into court in mechanic's lien cases.— See Code Civ. Pro., § 3413.

§ 149. **Complaint.**— The complaint must state in a plain and direct manner the facts, constituting the cause of action.

Notes to section 149.

This section is the same as section 2936 of the Code of Civil Procedure, applicable to justices' courts, which was made applicable to this court by section 1347 of the Consolidation Act (Laws 1882, chap. 410).

Account or instrument for the payment of money only.— There is no provision in this act as to pleading on an account or instrument for the payment of money only, and as section 20 makes the provisions of the Code of Civil Procedure applicable when they are not in conflict with the provisions of this act, we refer the practitioner to sections 531, 534, and 2941 upon that subject.

Account stated.— The complaint in an action upon an account stated is sufficient if it sets forth the fact that the account was stated between the parties, that a certain sum was found due from one to the other, and that such sum has not been paid. *Moss* v. *Lindblom*, 39 App. Div. 586, 57 N. Y. Supp. (91 St. Rep.) 703.

Bills and notes.— Where a copy of the instrument sued upon is set forth in the complaint and that instrument on its face shows the existence of a valid consideration, no other averment of consideration need be made. *Wood* v. *Knight*, 35 App. Div. 21, 54 N. Y. Supp. (88 St. Rep.) 466.

The complaint in an action upon a note which is lost need not allege the loss. *Dupignac* v. *Quick*, 26 Misc. Rep. 872, 56 N. Y. Supp. (90 St. Rep.) 385. See also § 1917, Code Civ. Proc., "Action upon lost negotiable paper."

The complaint in an action by an indorsee of a note need not allege that it was indorsed to plaintiff before maturity. *McGrath* v. *Pitkin*, 26 Misc. Rep. 862, 56 N. Y. Supp. (90 St. Rep.) 398.

The allegation that a promissory note was indorsed imports its delivery by the indorser. *New York Marbled Iron Works* v. *Smith*, 4 Duer, 362.

In an action against the maker, if the complaint alleges that the note was payable to the maker's order, that he indorsed it, or that the amount is due from him to the plaintiff, is sufficient, without also alleging that the note belongs to the plaintiff. 15 Abb. Pr. 347, n.; *Genet* v. *Sayre*, 12 Abb. Pr. 347.

In the complaint upon a note drawn payable at a particular bank, it is not necessary, as against the maker, to aver demand of payment at the bank. *Hill* v. *Place*, 5 Abb. Pr. (N. S.) 18; s. c., 36 How. Pr. 26.

In an action on a promissory note it is sufficient to allege that payment has been demanded and refused, without averring subsequent nonpayment. *Ahr* v. *Marx*, 44 App. Div. 391, 60 N. Y. Supp. 1091.

The complaint in an action on a promissory note brought against the maker need not allege that the note was presented and payment demanded. *Wells* v. *Simpson*, 29 Misc. Rep. 665, 61 N. Y. Supp. 56.

Benefit society.— A complaint in an action on a certificate of a benefit society need only allege that the insured and the beneficiary duly fulfilled all the conditions of the certificate, on their part to be fulfilled, without alleging that the insured was in good standing at the time of his death, or that there is any "provident fund" out of which the benefit can be paid, the good standing of the insured at the time of the issue of the certificate being presumed to have continued until the contrary is shown. *Ellis* v. *National Provident Union*, 50 App. Div. 255, 63 N. Y. Supp. 1012.

Bond.— The specific breaches must be specified in the complaint. *Western Bank* v. *Sherwood*, 29 Barb. 383.

Causes of action to be separately stated and numbered.— Where the complaint sets forth two or more causes of action, the statement of the facts constituting each cause of action must be separate and numbered. Code Civ. Proc., § 483.

Chattel and damages where the chattel was injured while in defendant's possession may be recovered. In that case he must set forth the facts in his complaint and demand judgment for damages accordingly. See § 119.

A complaint in an action for the wrongful detention of chattels, which alleges that the plaintiff's intestate at the time of her death was the owner of, and entitled to the immediate possession of, the chattels, and that the plaintiff was duly appointed her administrator; that the defendants are in possession of the chattels, and that the plaintiff has demanded their delivery to him, and that such demand has been refused, sufficiently complies with the requirement of section 1721 of the Code of Civil Procedure that such a complaint shall set forth the facts showing that the defendant's possession is unlawful. *Rogers* v. *Conde*, 67 App. Div. 131.

Conclusions of law not to be pleaded.— *City of Buffalo* v. *Holloway*, 7 N. Y. 493, 498; *Ramsay* v. *Erie R. R. Co.*, 38 N. Y. 193, 214.

An allegation that a party failed to fulfill his obligations is a conclusion of law. *Van Schaick* v. *Winne*, 16 Barb. 95.

So also is an allegation of *duty*. *City of Buffalo* v. *Holloway*, 7 N. Y. 493.

Also, that a specified act was *illegal* or contrary to *statute*. *Smith* v. *Lockwood*, 13 Barb. 209; s. c., 10 N. Y. Leg. Obs. 232.

Or, that the act was done *pursuant to statute*. *People* v. *McCumber*, 27 Barb. 632; s. c., 15 How. 186.

Or, that a party is not *entitled* to a thing; or, that a party is indebted. *Drake* v. *Cockroft*, 4 E. D. Smith, 34; *Merritt* v. *Milliard*, 5 Bosw. 645; *Lienau* v. *Lincoln*, 2 Duer, 670.

Construing.— The allegations of the complaint must be liberally construed, with a view to substantial justice between the parties. See § 170.

Contract.— A complaint alleging the delivery of lumber in consideration of orders made by the contractor upon the owner and accepted by him, payable when certain work was done; that such work had been completed, and that no part of the sum had been paid, states facts sufficient to constitute a cause of action. *Vanderbeek* v. *Hemmel*, 25 Misc. Rep. 299, 54 N. Y. Supp. (88 St. Rep.) 562.

Contract; performance; conditions precedent.— How pleaded. See § 169.

Corporations.— Complaint in actions by or against. See § 175 of this act, which is the same as § 1775, Code Civ. Proc.

A complaint in an action against a foreign corporation is not demurrable because it does not state that the plaintiff is a resident of this State, or where the contract was made. *Carter* v. *Hubert Booth, King & Bro. Pub. Co.*, 26 Misc. Rep. 652, 56 N. Y. Supp. (90 St. Rep.) 382.

Custom of trade.— Proof of a custom of trade not pleaded is inadmissible. *Dommerich* v. *Garfunkel*, 65 N. Y. Supp. 564.

Demand for relief.— Where the facts appear in the complaint, the court is to give such relief as the parties are entitled to, whether asked for in the prayer of the complaint or not. 12 N. Y. 336; *Jones* v. *Butler*, 30 Barb. 641; s. c., 20 How. Pr. 189.

Express and implied contract.— Under a complaint on an express contract for professional services, an implied contract cannot be proved. *Dennison* v. *Musgrave*, 29 Misc. Rep. 627, 61 N. Y. Supp. 188.

Facts must be pleaded and not fictions. *Lackey* v. *Vanderbilt*, 10 How. 155; *Bush* v. *Prosser*, 11 N. Y. 347, 352; *Kelly* v. *Brousing*, 33 Barb. 123.

Arguments are not facts, and should never be pleaded as such. *Gould* v. *Williams*, 9 How. 51.

Every fact necessary to be proved, or to maintain a defense, must be pleaded. *Knowles* v. *Gee*, 4 How. 317; *Allen* v. *Patterson*, 7 N. Y. 476; *McKyring* v. *Bull*, 16 N. Y. 297; *Freeman* v. *Fulton Fire Ins. Co.*, 38 Barb. 247.

In courts of limited jurisdiction, the pleadings must contain allegations of every fact necessary to confer jurisdiction. *Frees* v. *Ford*, 6 N. Y. 176; *Kundolf* v. *Thalheimer*, 12 N. Y. 593; *Harriott* v. *New Jersey R. R. Co.*, 8 Abb. 284; s. c., 2 Hilt. 262.

Facts occurring after suit brought not pleadable by plaintiff. *Muller* v. *Earle*, 37 N. Y. Super. 388.

Forms.— The court should not pay any attention to forms, if it can find any allegations which, under any view of them, may give a right to recover. *Butterworth* v. *O'Brien*, 39 Barb. 192; s. c., 24 How. Pr. 438.

Fraud.—An allegation that defendant, "by trick and device, or deception or otherwise," and while plaintiff "was helplessly intoxicated and confined to his bed" at defendant's hotel, "falsely and fraudulently obtained from" plaintiff $1,200 — bases the action on fraud, and is insufficient on demurrer for not stating the facts constituting the fraud. *Woolsey* v. *Sunderland*, 47 App. Div. 86, 62 N. Y. Supp. 104.

Hypothetical or alternative form of pleading not allowed. *Wils* v. *Fanning*, 9 How. 543; *Hamilton* v. *Hough*, 13 How. 14; *Corbin* v. *George*, 2 Abb. 465.

Infant.— The complaint must allege the due appointment of the guardian. *Hulbert* v. *Young*, 13 How. Pr. 413; *Grantman* v. *Thrall*, 44 Barb. 173.

A complaint in an action against an infant for necessaries is sufficient, if it contains allegations which, if alleged in a declaration at common law, would have stated a cause of action for debt for board and lodging or goods furnished. It is not necessary to allege in addition that the infant has no father or other person standing *in loco parentis*, who both could and should support the infant. *Goodman* v. *Alexander*, 28 App. Div. 227; revd., *Goodman* v. *Alexander*, 165 N. Y. 289.

Judgments; how pleaded.—See § 168, superseding the decision in *Grigg* v. *Reed*, 26 Misc. Rep. 298, 56 N. Y. Supp. (90 St. Rep.) 1093.

Landlord v. tenant.— A complaint for "one quarter's rent of" premises, describing them, and stating the amount claimed, is sufficient to recover against the assignee of a lease, for use and occupation for a period after he took possession, and before the time the assigned lease was to take effect. *Hubbell* v. *Clark*, 1 Hilt. 67.

An allegation that the overflow was caused by the negligence of the upper tenant in leaving open a stopcock attached to a water apparatus and allowing the water to run into a basin, which overflowed, sets up a good cause of action against him. *Citron* v. *Bayley*, 36 App. Div. 130, 55 N. Y. Supp. (89 St. Rep.) 382.

Master and servant.— The complaint being for wages due, plaintiff is confined to the period during which he actually rendered services; there can be no recovery for breach of contract under such a complaint. *Reed* v. *Newman*, 31 Misc. Rep. 792, 65 N. Y. Supp. 218.

In an action against both master and servant for injuries received through the negligence of the latter, the complaint must allege facts which show at least by fair implication that the act complained of was within the scope of the servant's employment, in order to charge

the master. *Fisher* v. *Brooklyn Jockey Club*, 50 App. Div. 446, 64 N. Y. Supp. 69. See also *Allinger* v. *McKeown*, 30 Misc. Rep. 275, 63 N. Y. Supp. 221.

Mechanic's lien action.— Requisites of, are prescribed in Code Civ. Proc., § 3404.

Medical expenses.— In an action for bodily injuries, plaintiff may prove his medical expenses under an allegation that he "was put, and will still be put, to much expense in the treatment of his said injuries." *McCready* v. *Staten Island R. R. Co.*, 51 App. Div. 338, 64 N. Y. Supp. 996.

Money loaned.— A complaint alleging that on a day specified defendant was indebted to plaintiff in the sum of $1,250 for money loaned by plaintiff to defendant; that prior to the commencement of this action payment of such sum was demanded from defendant, but that no portion thereof was paid except $75, which plaintiff realized through the foreclosure of a chattel mortgage, and that the sum of $1,175 is still due and owing by defendant to plaintiff, states a cause of action. *Ochs* v. *Frey*, 47 App. Div. 390, 62 N. Y. Supp. 67.

Money had and received.— Where the complaint was "for money had and received, damages $41.66," the court held it insufficient, but allowed an amendment to conform to the facts, so as to promote substantial justice. *Cushingham* v. *Phillips*, 1 E. D. Smith, 417.

A complaint which avers "that the defendant received the sum of $1,813.47, belonging to, or on account of the plaintiff, and which is now due to him," does not state facts sufficient to constitute a cause of action. *Betts* v. *Bache*, 14 Abb. Pr. 279.

Recovery for money received, under complaint, alleging also conversion. *Knapp* v. *Roche*, 37 N. Y. Super. (J. & S.) 305.

Necessaries furnished wife.— A complaint in an action to recover for necessaries furnished to a wife is sufficient if it contains allegations which, if alleged in a declaration at common law, would have a cause of action for goods furnished. The fact that it also alleges, in a case where the defendant and his wife were living separate and apart from each other, that the purchase was made by her as his agent, will not preclude a recovery without proof of an express agency, and the exclusion of evidence tending to show that the articles furnished were necessaries for the wife and children, on the ground that it tended to prove a different cause of action, is reversible error. *Hatch* v. *Leonard*, 38 App. Div. 128; revd., *Hatch* v. *Leonard*, 165 N. Y. 435.

Necessaries of infant.— See "Infant," above.

Partners; firm name.— A firm may do business under the name of one of the partners alone, and can sue in all their names on a contract made in the name of such one alone. *Martin* v. *Johnson*, 8 Daly, 541.

Performance.— Under an allegation of full performance of a contract, plaintiff cannot prove excuses and waivers. *Bloch* v. *Remelius*, 30 Misc. Rep. 804, 61 N. Y. Supp. 1124.

Private statute.— How pleaded. See § 167.

Replevin.— Requisites of complaint in action to recover chattels. *Schofield* v. *Whitelegge*, 49 N. Y. 259; *Simmons* v. *Lyons*, 56 N. Y. 671; *Van Der Minden* v. *Elsas*, 36 N. Y. Super. (J. & S.) 66.

Omission to allege demand and refusal. *Treat* v. *Hathorn*, 3 Hun, 646.

Representative capacity.— A complaint will not be held bad as not stating facts sufficient to constitute a cause of action, because it contains no express allegation that the plaintiff sues in a representative capacity, if the complaint contains the essential averments showing that the plaintiff has such representative capacity, and fairly apprises the defendant that the intent of plaintiff is to prosecute in such capacity. *Cordier* v. *Thompson*, 8 Daly, 172.

Special damages which are the natural but not necessary result of the injury complained of must be specifically alleged. *Geoghegan* v. *Third Ave. R. R. Co.*, 51 App. Div. 369, 64 N. Y. Supp. 630.

Time.— Where time is of the essence of the contract, waiver thereof cannot be proved if not alleged. *Rode* v. *Auerbaek*, 31 Misc. Rep. 765, 64 N. Y. Supp. 774.

Use and occupation.— It is not necessary to aver how the relation of landlord and tenant arose. A complaint, stating that on, etc., the defendant became indebted to the plaintiff in the sum of, etc., for the use and occupation of the plaintiff's premises, situated at, etc., and that no part of that sum has been paid, states facts sufficient to constitute a cause of action. *Waters* v. *Clark*, 22 How. Pr. 104.

The plaintiff need not set forth an implied demise, but may declare for use and occupation, and recover on the special facts shown. *Morris* v. *Niles*, 12 Abb. Pr. 103.

Waiver.— In an action to foreclose a mechanic's lien for work and materials furnished under a building contract, which makes the architect's certificate a condition precedent to plaintiff's right of payment, evidence of a waiver of such certificate is not admissible unless the waiver is pleaded. *Bossert* v. *Poersehke*, 51 App. Div. 381, 64 N. Y. Supp. 733.

What must be specially alleged.— Claim for allowance for materials. *Read* v. *Decker*, 5 Hun, 646.

Failure of consideration of a sealed instrument. *Dubois* v. *Hermance*, 56 N. Y. 673, affg. 1 Sup. Ct. (T. & C.) 293.

In an action to recover exempt property taken under execution the officer, if he wishes to justify under a judgment given for *purchase money*, must plead the justification. *Dennis* v. *Snell*, 54 Barb. 411; s. c., 34 How. Pr. 467.

A former adjudication upon the same cause of action. *Dalrymple* v. *Hunt*, 5 Hun, 111.

Pendency of another action, and set-off there. *White* v. *Talmage*, 35 N. Y. Super. (3 J. & S.) 223.

Necessity of averring special damage. *Baldwin* v. *N. Y. & Harlem Nav. Co.*, 4 Daly, 314.

§ 150. **Answer; what to contain.**— The answer of the defendant must contain:

1. A general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof, sufficient to form a belief.

2. A statement of any new matter constituting a defense or counterclaim, in ordinary and concise language, without repetition.

Notes to section 150.

This section is the same as section 500 of the Code of Civil Procedure. Section 1347 of the Consolidation Act (Laws 1882, chap. 410), made section 2938 of the Code of Civil Procedure, applicable to justices' courts, apply to this court. That section does not provide for answer on information and belief. The cases of *Nicoll* v. *Clark*, 13 Misc. Rep. 128, and *Lambert* v. *Hoffman*, 20 Misc. Rep. 331, decided that an answer, alleging that the defendant has no knowledge or information sufficient to form a belief, was neither a proper form of denial nor one authorized in this court.

In order to assimilate the practice of this court to courts of record section 500, instead of section 2938, of the Code of Civil Procedure was taken.

Abatement and bar.— If defendant unite matter in abatement and matter in bar, the court may disregard the former, and try the cause upon the merits. *Monteith* v. *Cash*, 1 E. D. Smith, 412; *Andreas* v. *Thorp*, 1 E. D. Smith, 615.

An allegation of the rendition of a former judgment is sufficient to raise the question of its effect as a bar; it is not necessary to plead any legal conclusions flowing from that fact. *Bracken* v. *Atlantic Trust Co.*, 36 App. Div. 67, 55 N. Y. Supp. (89 St. Rep.) 506.

Admissions.— Allegations in the complaint not denied in the answer must be deemed admitted. *Gregory* v. *Trainer*, 4 E. D. Smith, 58; *Dennison* v. *Carnahan*, 1 E. D. Smith, 144.

Another action pending; discontinuance and abatement.— The plea of another action pending for the same cause of action is not supported when it appears that, before the present suit was begun, a former action in the same court, in which the summons was served, abated, or became discontinued because, owing to the failure of the plaintiff's attorney to pay the trial fee, the clerk did not put the case on the calendar, and it was never called for trial. *Goldstein* v. *Loeb*, 21 Misc. Rep. 72.

AFFIRMATIVE DEFENSES; WHAT MUST BE PLEADED; WHAT CANNOT BE PROVEN UNDER A GENERAL DENIAL.

Consideration.— The complaint being upon a contract under seal, the seal is presumptive evidence of consideration, the lack of which is an affirmative defense which must be pleaded and cannot be proved under a denial of the allegation that defendant entered into the agreement for a good and valuable consideration. *Recknagal* v. *Steinway*, 58 App. Div. 352, modifying and affg. 33 Misc. Rep. 633, 68 N. Y. Supp. 957.

Possession.— In replevin by the owner of a chattel wrongfully taken from him, brought against a warehouseman who received it from the wrongdoer, a general denial only puts in issue the question whether he is lawfully in possession, and not whether he is in innocent possession, and such defense must be pleaded. *Milligan* v. *Brooklyn Warehouse & Storage Co.*, 34 Misc. Rep. 55, 68 N. Y. Supp. 744.

Statute of frauds.— The defense of the statute of frauds is an affirmative one and cannot be established under a general denial. *Franklin Coal Co.* v. *Hicks*, 46 App. Div. 441, 61 N. Y. Supp. 875. See *Stokes* v. *Polley*, 164 N. Y. 266; *Cruikshank* v. *Press P. Co.*, 32 Misc. Rep. 152, 65 N. Y. Supp. 678; *Rishel* v. *Weil*, 31 Misc. Rep. 70, 63 N. Y. Supp. 178.

The defense of an accord and satisfaction must be specially pleaded. *Habrich* v. *Donahue*, 51 App. Div. 375, 64 N. Y. Supp. 604. See also *Geneva M. Co.* v. *Coursey*, 45 App. Div. 268, 61 N. Y. Supp. 98.

Statute of limitations must be pleaded. *Baldwin* v. *Martin*, 14 Abb. Pr. N. S. 9.

Conclusion of fact.— An allegation in an answer that plaintiff ratified and confirmed a certain payment, and elected to consider it a proper payment to defendants, etc., is an allegation of a conclusion of fact and not of a conclusion of law. *Spies* v. *Monroe*, 35 App. Div. 527, 54 N. Y. Supp. (88 St. Rep.) 916.

Construing.— The allegations of the answer must be liberally construed with a view to substantial justice between the parties. See § 170.

Contract; performance; conditions precedent; how pleaded.— See § 169.

Conversion.— An admission in an answer in an action of conversion that "demand has been made for the delivery of the note and that he has not delivered it" is not a sufficient admission of a refusal to deliver. *Halbrau* v. *Gray*, 25 Misc. Rep. 693, 55 N. Y. Supp. (89 St. Rep.) 501.

Corporation.— Code Civ. Proc., § 1777. In an action or special proceeding, brought by or against a corporation, the defendant is deemed to have waived any mistake in the statement of the corporate name, unless the misnomer is pleaded in the answer or other pleading in the defendant's behalf.

Defect of parties must be set up in the pleadings. *Avogando* v. *Bull*, 4 E. D. Smith, 384, and is waived unless the objection is taken by answer. *Croueh* v. *Parker*, 56 N. Y. 597; *Hees* v. *Nellis*, 1 Sup. Ct. (T. & C.) 118.

Fact in complaint.— Where the existence of a fact is alleged in the complaint it is not necessary for the defendant to plead the same fact in the answer in order to entitle him to take advantage of it. *Terry* v. *Buck*, 40 App. Div. 419, 57 N. Y. Supp. (91 St. Rep.) 980.

Form of denial.— Defendant "has not sufficient knowledge or information to form a belief as to the allegations" contained in specified paragraphs of the complaint, "and he therefore denies the same," instead of the denial prescribed in Code Civ. Proc., § 500, that he "denies that he has any knowledge or information sufficient to form a belief," disapproved. *Johnson* v. *Andrews*, 34 Misc. Rep. 89, 68 N. Y. Supp. 764. See also *Burkert* v. *Bennett*, 35 Misc. Rep. 318, 71 N. Y. Supp. 144.

An allegation in an answer that "the defendants deny any knowledge or information," etc., should be "deny that they have any knowledge or information," in order to constitute a denial; and a denial of "the allegations contained in the paragraphs of the complaint numbered first, second, and third," being in gross, is bad. *Burkett* v. *Bennett*, 35 Misc. Rep. 318, 71 N. Y. Supp. 144.

An allegation in an answer that defendant "has no information sufficient to form a belief" as to the allegations of the complaint is insufficient under Code Civ. Proc., § 500, to put them in issue, there being no statement as to defendant's knowledge. *Steinbaek* v. *Diepenbroek*, 52 App. Div. 437, 65 N. Y. Supp. 118; *Place* v. *Bleyl*, 45 App. Div. 17, 60 N. Y. Supp. 800.

Where the complaint alleges that a certain sum is "due, owing, and *unpaid*," a denial that such sum, or any sum whatever, is due or owing raises no issue, as it admits that the sum named is *unpaid*. *De Forest* v. *Andrews*, 27 Misc. Rep. 145, 58 N. Y. Supp. (92 St. Rep.) 358.

Setting out a version of the transaction in question inconsistent with that set forth in the complaint is not a denial. *Place* v. *Bleyl*, 45 App. Div. 17.

Fraud.— While this court has no equity jurisdiction, fraud inducing a contract is there, as elsewhere, available as a defense. *Estelle* v. *Dinsbern*, 9 Misc. Rep. 485; s. c., 61 N. Y. St. Rep. 96; s. c., 30 N. Y. Supp. 226. See also 17 Misc. Rep. 371.

The rule that where a transaction is capable of two inferences, one in favor of the integrity of the transaction and the other to the contrary, the former inference will prevail, is applicable in respect to fraud upon the law as well as to fraud in fact. *Perry* v. *Booth*, 67 App. Div. 235.

General denial.— In an action for goods sold and delivered, where plaintiff proves a sale by sample, it is reversible error not to allow de-

fendant to prove, under a general denial, that the goods delivered were not in accordance with the sample, since he by his answer fully met the issue presented by the complaint. *Wilson* v. *Flickinger Co.*, 32 Misc. Rep. 369.

A general denial does not put in issue the fact alleged in the complaint of defendant's incorporation, and plaintiff need not prove it. *Deutz Lithographing Co.* v. *International Registry Co.*, 32 Misc. Rep. 687, 66 N. Y. Supp. 540.

A defendant should never plead as a defense anything which is embraced in a general denial. *McManus* v. *Western Assurance Co.*, 43 App. Div. 550, affg. 22 Misc. Rep. 328, 54 N. Y. Supp. (88 St. Rep.) 564.

Inconsistent defenses.— A defendant may plead as many defenses as he wishes and their inconsistency is no objection. *Seeman* v. *Bandler*, 25 Misc. Rep. 328, 54 N. Y. Supp. (88 St. Rep.) 546.

Defendant may plead separate, though inconsistent, defenses. *Kelley* v. *Supreme Council of Catholic Mut. Benefit Assoc.*, 46 App. Div. 79, 61 N. Y. Supp. 394.

Insufficient.— Where the plaintiff serves a verified written complaint, in an action on contract, the defendant must serve a verified answer; and where such an answer, interposed to one of the causes of action, merely states that the defendant, by his attorneys, "alleges and respectfully shows," that certain allegations of the complaint "are denied," it is ineffectual for any purpose, and the plaintiff is, in the absence of any amendment being allowed upon the trial, entitled to judgment upon that cause of action. The plaintiff is not bound in such a case to move to make the answer more definite and certain. *Fedor* v. *Samson*, 22 Misc. Rep. 111.

Judgment; how pleaded.— See § 168, superseding the decision in *Gregg* v. *Reed*, 26 Misc. Rep. 298, 56 N. Y. Supp. (90 St. Rep.) 1093.

Misnomer in an action by or against a corporation is waived unless pleaded in the answer. See § 177 of this act.

Mitigation of damages.— See § 174. A separate defense setting up facts in mitigation of damages, characterizes itself as a partial defense. *Robinson* v. *Evening Post Pub. Co.*, 25 Misc. Rep. 243, 55 N. Y. Supp. (89 St. Rep.) 62, 28 Civ. Proc. Rep. 239.

New matter.— A defense can consist only of new matter, which constitutes a defense to the action if all the material allegations of the complaint be taken as true; new matter being matter which is not embraced within the issue raised, or which can be raised by a denial, *i. e.*, it is matter which cannot be proved under a denial. *Staten Island Midland R. R. Co.* v. *Hinchcliffe*, 34 Misc. Rep. 49, 68 N. Y. Supp. 556.

Matter pleaded only as a defense is not available as a counterclaim, not being pleaded as such. *Pratt & Whitney* v. *American Pneumatic Tool Co.*, 50 App. Div. 369, 63 N. Y. Supp. 1062.

A defendant cannot join with denials new matter alleged as a defense, as such a course would prevent the plaintiff from demurring. *Fay* v. *Hanercoas*, 26 Misc. Rep. 421, 57 N. Y. Supp. (91 St. Rep.) 155.

Misjoinder.— An answer for misjoinder of defendants cannot be introduced after issue joined and proof taken on the merits. *Montfort* v. *Hughes*, 3 E. D. Smith, 591.

Nonjoinder.— The defense of nonjoinder of parties, being a plea in abatement, should not only state the names of the parties omitted, but allege that they are living within the jurisdiction of the court and within reach of process. *Mittendorf* v. *N. Y. & Harlem R. R. Co.*, 58 App. Div. 260, 68 N. Y. Supp. 1094.

Partial defenses.— How pleaded. See § 174.

Payment; application of.— Where a payment is made upon general account, and no direction is given as to its application, the law applies it to the oldest items. *Perry* v. *Booth*, 67 App. Div. 235.

Private statute.— How pleaded. See § 167.

Separately stated and numbered.— The requirement that defenses must be separately stated and numbered is not satisfied by simply numbering the paragraphs of the answer. *Fay* v. *Hanercoas*, 26 Misc. Rep. 421, 57 N. Y. Supp. (91 St. Rep.) 155.

Set-off.— A joint debt cannot be set off against an individual one. *Campbell* v. *Genet*, 2 Hilt. 290.

Statute of frauds need not be pleaded, but only the facts relied on to invoke it. *Morrill* v. *Cooper*, 65 Barb. 512.

Sufficient.— An answer in an action which informs the plaintiff of the nature of the defense, and the character of the evidence by which it is to be sustained, is sufficient. *Smith* v. *Hildenbrand*, 15 Misc. Rep. 129.

Supplemental answer.— Whether a supplemental answer was allowable was questioned in *Russell* v. *Ruckman*, 3 E. D. Smith, 419; and in *Meyers* v. *Rosenback*, 7 Misc. Rep. 560, it is shown that no such power exists.

Tender; payment into court.— A plea of tender before action should allege the tender and refusal, and that defendant has always been, and still is, ready to pay (8 Barb. 408, 5 Abb. Pr. 358, 23 Barb. 490, 2 E. D. Smith, 197, 2 Den. 196), and the amount tendered must be paid into court (2 E. D. Smith, 197, 25 How. Pr. 464), and notice of such payment must be given to the plaintiff's attorney. 25 How. Pr. 464. The answer should aver that the money is brought into court. 7 Robt. 389, 21 N. Y. 343. A defense of tender after action commenced must state the amount tendered and should include interest and costs to the time of the tender (8 How. Pr. 258), and the amount must be paid into court. 45 Barb. 579, 2 Hill, 538, Cow. Tr., §§ 1148 to 1160, 7 Robt. 389, 36 How. Pr. 26, 5 Abb. Pr. N. S. 18, 25 How. Pr. 464, 45 Barb. 554, 30 How. Pr. 226, 61 N. Y. 317.

Payment of money into court admits the cause or causes of action stated in the complaint, to the amount paid in, but beyond that the defendant may make his defense (Cow. Tr., § 1154, 7 Johns. 315, 2 Wend. 431), and the plaintiff is, in any event, entitled to the amount tendered or paid in. 1 Barb. 115, 1 E. D. Smith, 498, 1 Wend. 191, 13 Wend. 390. If the defendant pays in court less than is due, the plaintiff is entitled to a verdict and judgment for the whole amount, and must credit the payment on the judgment, for this preserves his right to costs, but if the payment equals the debt, defendant should have a verdict. *Dakin* v. *Dunning* 7 Hill, 30.

Test of sufficiency of defense.— The sufficiency of a defense is tested by the question whether, taking all the allegations of the complaint to be true, it constitutes a defense to the action. *Staten Island Midway R. R. Co.* v. *Hinchcliffe*, 34 Misc. Rep. 624, 70 N. Y. Supp. 601.

Title to sue.— Answer, not demurrer, the remedy where complaint fails to show title to sue. *Barclay* v. *Quicksilver Mining Co.*, 6 Lans. 25.

Usury.—Requisites of pleading usury. *Taylor* v. *Jackson*, 5 Daly, 497; *M. E. Nat. Bank* v. *C. W. Co.*, 49 N. Y. 635.

The defendants are bound to set up in the answer the contract, giving its terms, and the amount of the usurious premium or interest taken by the lender. 4 Paige, 526, 8 Paige, 457, 11 Paige, 17, 3 Hill, 565, 11 Barb. 100, 12 Barb. 601; *Grigg* v. *Howe*, 31 Barb. 100; *Miller* v. *Schuyler*, 20 N. Y. 522.

Waiver.— Answer on the merits waives all objections which would go in abatement of the action; notwithstanding the objection, either in the form of a motion to dismiss the complaint, or by a demurrer, which has been overruled, had been previously taken. *Andreas* v. *Thorp*, 1 E. D. Smith, 615; *Monteith* v. *Cash*, 1 E. D. Smith, 412; *Harper* v. *Leal*, 10 How. Pr. 276; *Gardner* v. *Clark*, 6 How. Pr. 449; *Bridge* v. *Payson*, 5 Sandf. 210; *Gossling* v. *Broach*, 1 Hilt. 49; *Boardman* v. *Gamble*, 4 E. D. Smith, 463.

A variance between the summons and the complaint is waived by pleading to the merits. *Miln* v. *Russell*, 3 E. D. Smith, 303, and note (*b*); *Brown* v. *Jones*, 3 Abb. Pr. 80; s. c., 1 Hilt. 204; *Hogan* v. *Baker*, 2 E. D. Smith, 22; *Robinson* v. *West*, 1 Sandf. 19; s. c., 11 Barb. 309; *Stevens* v. *Benton*, 39 How. Pr. 13; s. c., 2 Lans. 156.

The objection that plaintiff has not legal capacity to sue is waived, if not taken by demurrer or answer. *Palmer* v. *Davis*, 28 N. Y. 242; *Van Amringe* v. *Barnett*, 8 Bosw. 357; *Robbins* v. *Wells*, 26 How. Pr. 15; s. c., *less fully*, 18 Abb. Pr. 191. See *contra*, *Mosselmann* v. *Caen*, 1 Hun, 64.

§ 151. **Counterclaim defined.**— The counterclaim, specified in the last section, must tend, in some way, to diminish or defeat the plaintiff's recovery, and must be one of the fol-

lowing causes of action against the plaintiff, or, in a proper case, against the person whom he represents, and in favor of the defendant, or of one or more defendants, between whom and the plaintiff a separate judgment may be had in the action:

1. A cause of action arising out of the contract or transaction, set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action.

2. In an action on contract, any other cause of action on contract, existing at the commencement of the action.

Notes to section 151.

This section and sections 152, 153, 154, 155, and 156 are taken from sections 501 to 506 of the Code of Civil Procedure.

In the case of *Hanlon* v. *Metropolitan Life Ins. Co.*, 29 N. Y. Supp. 65; s. c., 9 Misc. Rep. 70, decided in June, 1894, it was pointed out that section 502 of the Code of Civil Procedure did not apply to *this court*. This present section is intended to remedy the former defect. By sections 2945 and 2946 of the Code of Civil Procedure, sections 501 to 506 were applicable to justices' courts. By the present section all these sections are now made applicable to this court.

Conversion and contract.— A cause of action for conversion cannot be made a counterclaim in an action upon contract unless it arises out of the same transaction, or is connected with the subject of the action. *De Forest* v. *Andrews*, 27 Misc. Rep. 145, 58 N. Y. Supp. (92 St. Rep.) 358, 29 Civ. Proc. Rep. 250.

Incapacity.— For form of demurrer to counterclaim, see *Armour* v. *Leslie*, 39 N. Y. Super. (J. & S.) 353.

Incapacity to sue not waived by not demurring. *Mosselmann* v. *Caen*, 1 Hun, 64.

Partnership.— A cause of action against a partnership cannot be interposed as a counterclaim in an action brought by one of the partners. *De Forest* v. *Andrews*, 27 Misc. Rep. 145, 58 N. Y. Supp. (92 St. Rep.) 358, 29 Civ. Proc. Rep. 250.

Statute of limitations not available to defeat counterclaim unless pleaded. *Williams* v. *Willis*, 15 Abb. Pr. N. S. 11.

Summary proceedings.— A counterclaim is allowed in this proceeding. *Sage* v. *Crowley*, 35 Misc. Rep. 117.

§ 152. **Rules respecting the allowance of counterclaim.**— But the counterclaim, specified in subdivision second of the last section, is subject to the following rules:

1. If the action is founded upon a contract, which has been assigned by the party thereto, other than a negotiable promissory note or bill of exchange, a demand existing against the party thereto, or an assignee of the contract, at the time of the assignment thereof, and belonging to the defendant, in good faith, before notice of the assignment, must be allowed as a counterclaim, to the amount of the plaintiff's demand, if it might have been so allowed against the party, or the assignee, while the contract belonged to him.

2. If the action is upon a negotiable promissory note or bill of exchange, which has been assigned to the plaintiff after it became due, a demand existing against a person who assigned or transferred it, after it became due, must be allowed as a counterclaim, to the amount of the plaintiff's demand, if it might have been so allowed against the assignor, while the note or bill belonged to him.

3. If the plaintiff is a trustee for another or if the action is in the name of the plaintiff, who has no actual interest in the contract upon which it is founded, a demand against the plaintiff shall not be allowed as a counterclaim; but so much of a demand existing against the person whom he represents, or for whose benefit the action is brought, as will satisfy the plaintiff's demand, must be allowed as a counterclaim, if it might have been so allowed in an action brought by the person beneficially interested.

Note to section 152.

See notes to § 151.

§ 153. **Judgment when demand or counterclaim are equal or unequal.**— Where a counterclaim is established, which equals the plaintiff's demand, the judgment must be in favor of the defendant. Where it is less than the plaintiff's demand, the plaintiff must have judgment for the residue only. Where it exceeds the plaintiff's demand, the defendant must have judgment for the excess, or so much thereof as is due from the plaintiff; the judgment does not prejudice the de-

fendant's right to recover, from another person, so much thereof as the judgment does not cancel.

Note to section 153.

See notes to § 151.

§ 154. **For affirmative relief.**— In a case not specified in the last section where a counterclaim is established, which entitles the defendant to an affirmative judgment, demanded in the answer, judgment must be rendered for the defendant accordingly.

Note to section 154.

See notes to § 151.

§ 155. **Counterclaim when defendant is sued in a representative capacity.**— In an action against an executor or administrator, or other person sued in a representative capacity, the defendant may set forth, as a counterclaim, a demand belonging to the decedent or other person whom he represents, where the person so represented would have been entitled to set forth the same, in an action against him.

Note to section 155.

See notes to § 151, and § 1, subd. 18.

§ 156. **When plaintiff is an executor or administrator.**— In an action brought by an executor or administrator, in his representative capacity, a demand against the decedent, belonging, at the time of his death to the defendant, may be set forth by the defendant as a counterclaim, as if the action had been brought by the decedent in his lifetime; and, if a balance is found to be due to the defendant, judgment must be rendered therefor against the plaintiff, in his representative capacity. Execution can be issued upon such a judgment only in a case where it could be issued upon a judgment in an action against the executor.

Note to section 156.

See notes to § 151, and § 1, subd. 18.

§ 157. **Counterclaim where amount is in excess of courts' jurisdiction.**— Where defendant has a counterclaim which is in excess of the amount of the jurisdiction of this court, the counterclaim may be interposed, and in the event of judgment being rendered in defendant's favor, sustaining said counterclaim, said judgment shall not be for any larger sum in any event than the sum to which the court has jurisdiction, exclusive of costs, but nothing in this section shall be construed to estop such a defendant from bringing an action against the plaintiff for the difference between the sum of the court's jurisdiction, and the sum claimed by said defendant to be due unless the judgment shall state that the sum awarded by the judgment is the whole amount found to be due.

Note to section 157.

See notes to § 151.

§ 158. **When defendant may demur.**—The defendant may demur to the complaint, where one or more of the following objections thereto, appear upon the face thereof:

1. That the court has not jurisdiction of the person of the defendant.

2. That the court has not jurisdiction of the subject of the action.

Notes to section 158.

This section is the same as section 488 of the Code of Civil Procedure.

Section 1347 of the Consolidation Act (Laws 1882, chap. 410) made section 2939 of the Code of Civil Procedure, which was applicable to justices' courts, applicable to this court, but it was thought that section 488 of the Code, applicable to courts of record, was clearer, so that section was made to apply instead of section 2939.

Amendment of pleadings.— See § 166.

Counterclaim.— A demurrer to a counterclaim is not necessary in this court. See § 161.

Demurrer and answer.— Demurrer to all or part of the complaint, and answer to part may be made as provided by section 160 of this act. See *McKesson* v. *Russian Co.*, 27 Misc. Rep. 96, 57 N. Y. Supp. (91 St. Rep.) 579, where it was held, that where a complaint states but a single cause of action the defendant cannot demur to a part and answer as to another part.

Joint demurrer.— A joint demurrer by two defendants cannot be sustained if the complaint states a cause of action against either. *Moore* v. *Chas. E. Monell Co.*, 27 Misc. Rep. 235, 58 N. Y. Supp. (92 St. Rep.) 430.

Part.— A demurrer to a part only of a single cause of action is bad. *Toplitz* v. *Toplitz*, 54 App. Div. 630, 66 N. Y. Supp. 386.

Several defenses.— A demurrer taken to several defenses will be overruled if one of them is good. *McGrath* v. *Pitkin*, 26 Misc. Rep. 862, 56 N. Y. Supp. (90 St. Rep.) 398.

3. That the plaintiff has not legal capacity to sue.

4. That there is another action pending between the same parties, for the same cause.

Notes to section 158, subdivision 3.

Waiver.— The objection that plaintiff has no legal capacity to sue is waived, if not taken by demurrer or answer. *Palmer* v. *Davis*, 28 N. Y. 242; *Van Amringe* v. *Barnett*, 8 Bosw. 357; *Robbins* v. *Wells*, 26 How. Pr. 15, less fully reported in 18 Abb. Pr. 191.

To the contrary, see *Mosselmann* v. *Caen*, 1 Hun, 64.

5. That there is a misjoinder of parties plaintiff.

Notes to section 158, subdivision 5.

See *Aekley* v. *Tarbox*, 29 Barb. 512; *Abbe* v. *Clark*, 31 Barb. 238, where it was held a demurrer would not lie where two persons are improperly joined as plaintiffs. This section nullifies these decisions.

An objection of misjoinder of plaintiff must be taken by demurrer or answer. *Egbert* v. *Hanson*, 34 Misc. Rep. 760.

6. That there is defect of parties, plaintiff or defendant.

Notes to section 158, subdivision 6.

In *Persons* v. *Kruger*, 39 App. Div. 416, 57 N. Y. Supp. (91 St. Rep.) 416, it was held a defense that there are partners not made parties must be pleaded, and the answer must state their names. This section nullifies that decision.

Nonjoinder.— A demurrer cannot be sustained for the nonjoinder of a party, unless it appears that he is still living. *Strong* v. *Wheaton*, 38 Barb. 616.

Surviving partner, etc.— The objection that the surviving partners, although alleged to be insolvent, should be joined as parties in an action against the representatives of a deceased partner should be taken

by demurrer, and cannot be raised for the first time on appeal. *Hotopp v. Huber*, 160 N. Y. 524, 55 N. E. Rep. 206.

7. That causes of action have been improperly united.

8. That the complaint does not state facts sufficient to constitute a cause of action.

Note to section 158, subdivision 8.

Test.—The test by which a demurrer, on the ground the complaint does not state a cause of action, is to be tried, is whether the complaint sets forth facts which, if true, would entitle the plaintiff to any relief whatever. *Struble* v. *Kings County Trust Co.*, 60 App. Div. 548, 69 N. Y. Supp. 1092.

§ 159. **Demurrer to complaint must specify grounds of objection.**— The demurrer must distinctly specify the objections to the complaint, otherwise it may be disregarded. An objection, taken under subdivision first, second, fourth or eighth of section one hundred and fifty-eight of this act, may be stated in the language of the subdivision; and an objection taken under either of the other subdivisions, must point out specifically the particular defect relied upon.

Note to section 159.

This section is the same as section 480 of the Code of Civil Procedure, applicable to courts of record, and is new as applicable to this court. There is no similar provision applicable to justices' courts. Section 2939 of the Code of Civil Procedure, applicable to justices' courts, provides for a demurrer without requiring the statement of any grounds.

§ 160. **Demurrer to all or part of the complaint; may answer to part.**— The defendant may demur to the whole complaint, or to one or more separate causes of action, stated therein. In the latter case, he may answer the cause of action not demurred to.

Note to section 160.

This section is the same as section 492 of the Code of Civil Procedure, applicable to courts of record, and is new as applicable to this court.

Separate paragraph.— A demurrer will only lie to the whole of a cause of action or defense, and not to a separate paragraph of a

pleading. *Hollingsworth* v. *Spectator Co.*, 53 App. Div. 291, 65 N. Y. Supp. 812.

A demurrer must be directed to an entire cause of action or defense; it cannot be made to a separate paragraph of a pleading not designated nor considered as a separate defense, and it the party desiring to demur so regards it he should first move that it be properly designated. *N. J. Steel & Iron Co.* v. *Robinson*, 60 App. Div. 69, affg. 33 Misc. Rep. 361, 68 N. Y. Supp. 577. See also *McKesson* v. *Russian Co.*, 27 Misc. Rep. 96, 57 N. Y. (91 St. Rep.) 430.

§ 161. **Formal reply or demurrer to counterclaim not necessary.**— A formal reply to a counterclaim is not necessary. The counterclaim shall be deemed denied by the plaintiff unless specifically admitted on the trial. It also may be objected to on motion, or demurred to as if the counterclaim were an affirmative cause of action, set up in a complaint.

Note to section 161.

This section is new. It will be observed that the preamble to section 145 omits a reply.

§ 162. **When plaintiff may demur to answer.**— The plaintiff may demur to a counterclaim or a defence consisting of new matter contained in the answer, on the ground that it is insufficient in law on the face thereof.

Notes to section 162.

This section is the same as section 494 of the Code of Civil Procedure, relative to courts of record, and is new as applicable to this court.

Bad complaint.— A bad answer is good enough for a bad complaint, and, on demurrer to the former for insufficiency, the sufficiency of the complaint may be attacked. *Savage* v. *City of Buffalo*, 50 App. Div. 136, 63 N. Y. Supp. 941.

Demurrer to the answer opens the complaint to attack, and, if bad, it will be dismissed. *Tuthill* v. *City of New York*, 29 Misc. Rep. 555, 61 N. Y. Supp. 968. See also *Kent* v. *Village, etc.*, 50 N. Y. Supp. 502.

Form.— A form of demurrer, "that said amended answer is insufficient for the reason that it does not state facts sufficient to constitute a defense," is defective, and should be overruled, since Code Civ. Proc., § 494, requires it to be made upon "the ground that the pleading is insufficient in law upon the face thereof," a demurrer being

a technical pleading, and, if materially defective, not raising an issue. *McCann* v. *Hazard*, 36 Misc. Rep. 7, 72 N. Y. Supp. 45.

§ 163. **Requirements concerning verified pleadings.**— The allegations or denials in a verified pleading must in form be stated to be made by the party pleading. Unless they are therein stated to be made on the information and belief of the party, they must be regarded, for all purposes, as having been made on the knowledge of the person verifying the pleading. An allegation that the party has not sufficient knowledge or information to form a belief with respect to a matter, must, for the same purpose, be regarded as an allegation that the person verifying the pleading has not such knowledge or information.

Note to section 163.

This section is substantially the same as section 524 of the Code of Civil Procedure, relating to courts of record. For authorities under this section, see the Annotated Codes of Civil Procedure, and see notes to next section.

§ 164. **Verification; how and by whom made.**— The verification must be made by the affidavit of the party, or, if there are two or more parties united in interest, and pleading together, by at least one of them who is acquainted with the facts, except as follows:

1. Where the party is a domestic corporation, the verification must be made by an officer thereof.

2. Where the people of the state are, or a public officer, in their behalf, is the party, the verification may be made by any person acquainted with the facts.

3. Where the party is a foreign corporation; or where the party is not within the county where the attorney resides, or if the latter is not a resident of the state, the county where he has his office, and capable of making the affidavit; or, if there are two or more parties united in interest and pleading together, where neither of them, acquainted with the facts, is within that county and capable of making the affidavit; or where the action or defence is founded on a written instrument for the payment of money only, which

is in the possession of the agent or the attorney; or where all the material allegations of the pleading are within the personal knowledge of the agent or the attorney; in either case the verification may be made by the agent of or the attorney for the party.

Notes to section 164.

This section is the same as section 525 of the Code of Civil Procedure, relating to courts of record. Section 524 of the Code of Civil Procedure, which is substantially similar to section 163 of this act, is entitled "Form and construction of certain allegations and denials in verified pleadings." Section 526 of said Code is entitled "Form of affidavit of verification," which has been omitted from this act, and is probably made applicable by the general provisions of section 20 of this act.

Association.— Must be in the name of the person suing, or if by any other officer, it must be as agent or attorney. *Tallmadge* v. *Loundsbury*, 23 Abb. N. C. 331.

Attorney.— A statement that the attorney "could not find the party in the city" gives no sufficient reason for a verification by an attorney, and such an answer may be treated as a nullity. *Lyons* v. *Murat*, 54 How. Pr. 23. And see *Duparquet* v. *Fairfield*, 49 Hun, 471.

Corporation.— See *American Insulator Co.* v. *Bankers, etc.*, 13 Daly, 200; *Kelly* v. *Woman's Pub. Co.*, 15 Civ. Proc. Rep. 259, 4 N. Y. Supp. 99.

Date.— Failure to insert the date in a verification not fatal. *Griffin* v. *Barton*, 21 Misc. Rep. 513; *Babcock* v. *Kuntsch*, 85 Hun, 33.

Defective verification; remedy.— See § 528, Code Civ. Proc. The verification of an answer to a duly verified complaint, which states that "the foregoing answer is true," omitting the words "to his knowledge," is insufficient, and the plaintiff may return the answer, and proceed as on failure to answer. *Sexauer* v. *Bowen*, 3 Daly, 405; s. c., 10 Abb. N. S. 335; *Snaps* v. *Gilbert*, 13 Hun, 494. See *Fusco* v. *Adams*, 19 Civ. Proc. Rep. 48.

Knowledge.— Where all the allegations are made upon the knowledge of the person verifying, the affidavit may omit the statement as to information and belief. *Ladue* v. *Andrew*, 54 How. 160.

§ 165. **Exhibition of accounts at instance of adverse party may be ordered.**— The court may at the time of pleading, or at any other time before the trial, require the plaintiff or defendant to exhibit to the inspection of the adverse party, with liberty to copy the same, any writing or account de-

clared on or set up in the way of offset or counterclaim, or if not so exhibited, may prohibit its afterward being given in evidence.

Notes to section 165.

This section is the same as section 1361 of the Consolidation Act (Laws 1882, chap. 410), which was taken from section 24, chapter 344, Laws 1857, and was, in addition to section 2942 of the Code of Civil Procedure, relating to justices' courts, made applicable to this court by section 1347 of the Consolidation Act. It applies only to "any writing or account" and is distinct from a bill of particulars. See § 531, Code Civ. Proc. Bill of particulars is provided for in this act by section 145, subdivisions 1 and 6, although there is no provision for a demand for the same.

Account and bill of particulars.— As to the difference between them, see *Giles* v. *Betz*, 15 Abb. Pr. 285, which refers to the latter, and *Williams* v. *Shaw*, 4 Abb. Pr. 209, to the former.

Debits and credits should be given in an itemized statement. *Dowdney* v. *Volkening*, 37 N. Y. Super. 313.

Detailed statement.— The copy account need not, it seems, give a detailed statement of the amounts received from the adverse party on such account. *Williams* v. *Shaw*, 4 Abb. Pr. 209; *Ryckman* v. *Haight*, 15 Johns. 222; *Gillies* v. *Betz*, 15 Abb. Pr. 285.

For further notes applicable to this section, see notes to § 145, "Bill of particulars."

§ 166. **Amendment of pleadings.**— The court must, upon application, allow a pleading to be amended, at any time, if substantial justice will be promoted thereby. Where a party amends his pleading, after joinder of issue, or pleads over upon the decision of a demurrer, and it is made to appear to the satisfaction of the court, by oath, that an adjournment is necessary to the adverse party, in consequence of the amendment or pleading over, an adjournment must be granted. The court may also, in its discretion, require, as a condition of allowing an amendment, the payment of costs to the adverse party.

Notes to section 166.

This section is substantially the same as section 2944 of the Code of Civil Procedure, relating to justices' courts, which was made applicable by section 1347 of the Consolidation Act (Laws 1882, chap. 410).

Allowance of amendment is mandatory upon the court.— It is mandatory to allow a pleading to be amended at any time before trial, or during the trial, if substantial justice will be promoted thereby, and a refusal to allow amendment in a proper case is appealable. *King* v. *Dorman*, 26 Misc. Rep. 133, 55 N. Y. Supp. 876. See also *Milch* v. *The Westchester, etc.*, 13 Misc. Rep. 231.

Where the complaint was for coal sold and delivered on the order of defendant's wife,— *Held*, that the justice should have permitted an amendment at the trial so as to make the complaint for necessaries furnished. *Thedford* v. *Reade*, 28 Misc. Rep. 563, 59 N. Y. Supp. 537.

Demurrer.— If the demurrer is well founded the court must permit an amendment. *Morris* v. *Hunken*, 40 App. Div. 129, 57 N. Y. Supp. 712. See also *Stern* v. *Drinker*, 2 E. D. Smith, 402; *Glass* v. *Kewlson*, 3 Abb. Pr. 100; *Hillard* v. *Austin*, 17 Barb. 141.

Justice volunteering.— It is not proper for the justice to volunteer to make amendments not moved for by either party. *Lloyd* v. *Fox*, 1 E. D. Smith, 101; *Enright* v. *Seymour*, 8 N. Y. St. Rep. 356.

Material variance between the pleading and proof; how provided for, and amendment on terms. See § 172.

Mistake in name of defendant is waived if not pleaded. *City of New York* v. *Union Ry. Co.*, 31 Misc. Rep. 451, 64 N. Y. Supp. 483.

New cause of action, or new defense, may be introduced by amendment, though a reasonable adjournment should be granted, if required, and such costs imposed as are proper. *Hawkes* v. *Burke*, 34 Misc. Rep. 189, 68 N. Y. Supp. 798.

Code Civ. Proc., § 3377, subd. 6, extending to all courts the provisions of section 723, authorizing amendments not substantially changing the cause of action or defense, does not limit the power of amendment given to municipal courts by section 2944, authorizing any amendment; but a municipal court may grant an amendment, though involving a new cause of action or defense. *Shirtcliffe* v. *Wall*, 68 App. Div. 375, 74 N. Y. Supp. (108 St. Rep.) 189. See also *Doughty* v. *Crozier*, 9 Abb. Pr. 411; *Cooper* v. *Kinney*, 6 Abb. Pr. 380; *Hawkes* v. *Burke*, 34 Misc Rep. 189. To the contrary, see *Balch* v. *Wurzburger*, 9 Misc. Rep. 74; *Dows* v. *Morrison*, 2 Misc. Rep. 54.

Payment.— A justice of this court has power to permit an amendment at the trial setting up payment. *Majansky* v. *Lipman*, 33 Misc. Rep. 747, 67 N. Y. Supp. 84.

Tort and contract.— This court has power to allow an amendment of a complaint for conversion, changing the allegations from tort to those of breach of contract. *Doughty* v. *Crozier*, 9 Abb. Pr. 411; *Cooper* v. *Kinney*, 6 Abb. Pr. 380; *Hawkes* v. *Burke*, 34 Misc. Rep. 189.

§ 167. **Private statute; how pleaded.**— In pleading a private statute, or a right derived therefrom, it is sufficient to

designate the statute by its chapter, year of passage and title, or in some other manner with convenient certainty, without setting forth any of the contents thereof.

Notes to section 167.

This section is the same as section 530 of the Code of Civil Procedure, applicable to courts of record.

For notes under the subject of "Pleading," see § 149, "Complaint;" § 150, "Answer, what to contain."

§ 168. **Judgments; how pleaded.**— In pleading a judgment, or other determination of a court or officer of special jurisdiction, it is not necessary to state the facts conferring jurisdiction; but the judgment or determination may be stated to have been duly given or made. If that allegation is controverted the party pleading must on the trial establish the facts conferring jurisdiction.

Notes to section 168.

This section is the same as section 532 of the Code of Civil Procedure, applicable to courts of record.

For further notes upon pleading, see §§ 149 and 150.

§ 169. **Conditions precedent; how pleaded.**— In pleading the performance of a condition precedent in a contract it is not necessary to state the facts constituting performance; but the party may state generally that he or the person whom he represents duly performed all the conditions on his part. If that allegation is controverted he must on the trial establish performance.

Notes to section 169.

This section is the same as section 533 of the Code of Civil Procedure, relating to courts of record.

For further notes upon pleading, see §§ 149 and 150.

170. **Pleadings to be liberally construed.**— The allegations of a pleading must be liberally construed, with a view of substantial justice between the parties.

Note to section 170.

This section is the same as section 519 of the Code of Civil Procedure, relating to courts of record.

§ 171. **Immaterial variance in pleading to be disregarded.**— A variance between an allegation in a pleading and the proof, must be disregarded as immaterial, unless the court is satisfied that the adverse party has been misled thereby, to his prejudice.

Note to section 171.

This section is the same as section 2943 of the Code of Civil Procedure, relating to justices' courts, which was made applicable to this court by section 1347 of the Consolidation Act (Laws 1882, chap. 410).

§ 172. **Material variances; how provided for.**— A variance between an allegation in a pleading and the proof is not material unless it has actually misled the adverse party to his prejudice in maintaining his action or defense on the merits. If a party insists that he has been misled that fact and the particulars in which he has been misled must be proved to the satisfaction of the court. Thereupon the court may in its discretion order the pleading to be amended on such terms as it deems just.

Note to section 172.

This section is the same as section 539 of the Code of Civil Procedure, applicable to courts of record.

§ 173. **What to be deemed a failure of proof.**— Where, however, the allegation to which the proof is directed is unproved, not in some particular or particulars only, but in its entire scope and meaning, it is not a case of variance within the last two sections, but a failure of proof.

Note to section 173.

This section is the same as section 541 of the Code of Civil Procedure, applicable to courts of record.

§ 174. **Partial defenses.**— A partial defense may be set forth, but it must be expressly stated to be a partial defense

to the entire complaint, or to one or more separate causes of action therein set forth. On a demurrer thereto the question is whether it is sufficient for that purpose. Matter tending only to mitigate or reduce damages in an action to recover damages for a personal injury, or an injury to property, is a partial defense within the meaning of this section.

Note to section 174.

This section is substantially the same as section 508 of the Code of Criminal Procedure, relating to courts of record.

§ 175. **Complaint in actions by or against corporations.**— In an action brought by or against a corporation, the complaint must aver that the plaintiff, or the defendant, as the case may be, is a corporation; must state whether it is a domestic corporation or a foreign corporation; and, if the latter, the state, country or government, by or under whose laws it was created. But the plaintiff need not set forth, or specially refer to, any act or proceedings by or under which the corporation was created.

Notes to section 175.

This section is the same as section 1775 of the Code of Civil Procedure, relating to courts of record.

For notes as to "Complaint" and "Answer," see §§ 149 and 150.

§ 176. **When proof of corporate existence unnecessary.**— In an action brought by or against a corporation, the plaintiff need not prove, upon the trial, the existence of the corporation unless the answer is verified and contains an affirmative allegation that the plaintiff, or the defendant, as the case may be, is not a corporation.

Notes to section 176.

This section is the same as section 1776 of the Code of Civil Procedure, relating to courts of record.

Proof of rest of case must however be made, although the defendant is in default. *Crown, etc.* v. *Fitzgerald*, 14 N. Y. St. Rep. 427.

§ 177. **Misnomer; when waived.**— In an action or special proceeding brought by or against a corporation, the defendant is deemed to have waived any mistake in the statement of the corporate name, unless the misnomer is pleaded in the answer or other pleading in the defendant's behalf.

Note to section 177.

This section is the same as section 1777 of the Code of Civil Procedure, relating to courts of record. See notes to "Pleadings;" "Complaint," § 149, and "Answer," § 150.

§ 178. **Pleadings in actions on bastardy bonds.**— The pleadings and proceedings in actions in which the people of this state are a party, where such actions are brought by the overseers of the poor or the commissioners of public charities and correction, upon bastardy or abandonment bonds, shall be the same as in actions brought on bonds with conditions other than for the payment of money, and for any breach of the condition of such bond given in cases of bastardy which shall happen after the recovery of any damages or the commencement of any suit, the municipal court in the district in which the action was originally brought shall have power to issue a new summons, and upon the return thereof to ascertain the amount of damages arising from said breach, and to give judgment accordingly; and in suits upon bonds given in abandonment cases the court shall have the same power as to requiring further security or committing defendant in default thereof, as are conferred by law, upon the judges of courts of record in similar cases.

Note to section 178.

This section is substantially the same as section 1348 of the Consolidation Act (Laws 1882, chap. 410), which was the second clause of section 1, chapter 389, Laws 1862. It assumes that section 1, subdivision 4, has given this court jurisdiction of actions upon bastardy and abandonment bonds, which it has not, as no case where it is *prescribed* by law that such an action can be maintained can be found. Laws 1862, chap. 389, § 1, was such a case where it was *prescribed* by law that such an action could be maintained, but that law was repealed by Laws 1880, chap. 245, and Laws 1881, chap. 537, and no

law *prescribing* that such an action can be maintained has since been enacted in place of it, or otherwise. See notes to § 1, subd. 4, as to whether this court has jurisdiction in an action upon a bastardy or abandonment bond. See § 339. See also § 30 as to "Alias summons."

§ 179. **Answer of title.**— The defendant may, either with or without other matter of defense, set forth in his answer facts showing that the title to real property will come in question. Such an answer must be in writing, and it must be signed by the defendant, or his attorney or agent, and delivered to the court. The court must, thereupon, countersign the answer, and deliver it to the plaintiff.

Notes to section 179.

This section is the same as section 1349 of the Consolidation Act (Laws 1882, chap. 410), which is the same as section 2951 of the Code of Civil Procedure, relating to justices' courts.

This defense is not as often interposed in this court as it is in courts of justices of the peace in the country, and therefore the practitioner is referred to Cowen's Treatise, Throop's New York Justices' Manual, and the decisions under sections 2951 to 2958, both inclusive, of the Code of Civil Procedure, under "Courts of justices of the peace and proceedings therein." See also subd. 2, § 2863, of said Code.

Amended answer.— An answer of title may be interposed by an amended answer after an adjournment. *Hinds* v. *Page*, 6 Abb. N. S. 58; *Weeks* v. *Stroble*, 36 How. 123.

Board of health.— By charter, § 1262, it is provided that the "court shall not lose jurisdiction of any action by reason of a plea that title to real estate is involved, provided the defendant is sought by the pleadings to be charged in said action on any of the grounds mentioned in this chapter, other than by virtue of ownership of such real estate."

No jurisdiction.— By section 2 of this act this court has no jurisdiction where the title to real property comes in question, *except* in summary proceedings. See also *Quinn* v. *Quinn*, 46 App. Div. 241; *Sage* v. *Crosby*, 35 Misc. Rep. 117. Where the parties consent to try cause where title is in issue, it will not confer jurisdiction upon the justice. *Stryker* v. *Mott*, 6 Wend. 645, 4 How. 44.

Retention of undertaking.— Where the answer of title is in proper form, a retention of the undertaking is sufficient to oust the court of jurisdiction. *Manfredi* v. *Wiederman*, 14 Misc. Rep. 342.

When title comes in question.— Where, in an action by an assignee of a lessor of a lease in fee, to recover rent, the complaint alleged that

the plaintiff became the owner of the rent, and seized in fee of the estate, and the defendant denied all allegations of the complaint. *Main* v. *Cooper*, 26 Barb. 468.

Where one is charged with liability arising out of being owner of land, and he disclaims being the owner, this raises a question of title. *Ryan* v. *Harrigan*, 9 Hun, 520; *Alleman* v. *Dey*, 49 Barb. 641.

An allegation that the defendants are the owners in fee of the premises, at the time of the alleged trespass, is sufficient to raise the question of title to real property. *Manfredi* v. *Wiederman*, 14 Misc. Rep. 342.

Title embraces the right to possession and everything but the bare, naked possession. *Ebbe* v. *Quackenbush*, 6 Hill, 537. See also *Rathbone* v. *McConnell*, 21 N. Y. 466; *Clow* v. *Van Loan*, 4 Hun, 184.

When title does not come in question.— The introduction of a deed to establish some other fact than title does not raise a question of title. *Nicols* v. *Bain*, 27 How. 286; *Heintz* v. *Dellinger*, 28 How. 39; s. c., 42 Barb. 53.

Title does not come in question in a suit to recover a tax paid by mistake by the plaintiff on a lot of defendant, the defendant's title not being disputed on the trial. *Nixon* v. *Jenkins*, 1 Hilt. 318.

In the trial of an action no question of title to certain realty arose on the pleadings; plaintiff however sought to prove his possession by oral testimony. Defendant objected on the ground that plaintiff's right to possession was put in issue, whereupon plaintiff duly proved his title thereto. The trial judge also certified that a claim of title to realty came in question. *Held*, that, as title was proven in answer to defendant's objection, he cannot now say that such objection was unfounded, and that the question of title did not properly arise on the trial. *Foster* v. *Romer*, 15 Week. Dig. 487. See also *Collins* v. *Adams*, 10 N. Y. St. Rep. 48.

Where the complaint is so drawn that the defendant can set up a title in his answer, but he omits to do so, the justice retains his jurisdiction, and the defendant will be precluded from drawing it in question on the trial. *Adams* v. *Rivers*, 11 Barb. 390; *Fred. & S. Plankroad Co.* v. *Wait*, 27 Barb. 214; *Brown* v. *Scofield*, 8 Barb. 239.

The question of actual possession is not a question of title. *Rathbone* v. *McConnell*, 21 N. Y. 466; *Clow* v. *Van Loan*, 4 Hun, 184. See also *Ebbe* v. *Quackenbush*, 6 Hill, 537.

Penalty for failure to deliver undertaking is that the court has jurisdiction to proceed, and the defendant is precluded in his defense from denying the title in question. See § 183.

§ 180. **Defendant in answer of title to deliver undertaking.** —In the case specified in the last section, the defendant must also deliver to the court, with the answer, a written

undertaking, executed by one or more sureties, approved by the court, to the effect that, if the plaintiff, within twenty days thereafter, deposits with the court a summons and complaint in a new action, for the same cause, to be brought in the proper court, as prescribed in the next section, the defendant will, within twenty days after the deposit, give a written admission of the service thereof. Where the defendant was arrested in the action before the court, the undertaking must further provide that he will, at all times, render himself amenable to any mandate which may be issued to enforce a final judgment in the action so brought. If the defendant fails to comply with the undertaking, the sureties are liable thereupon to any amount for which judgment might have been rendered by the municipal court, if the answer and undertaking had not been delivered.

Notes to section 180.

This section is the same as section 1350 of the Consolidation Act (Laws 1882, chap. 410), substituting the word "court" for "justice," which is the same as section 2952 of the Code of Civil Procedure, relating to justices' courts.

Defense.— The defense of title will not avail, unless an undertaking is furnished. *Little* v. *Dean*, 34 N. Y. 452. See § 2, subd. 1, and notes.

§ 181. **New action to be brought in supreme court.**— The court, in which a new action is to be brought, as prescribed in the last section, is the supreme court.

Note to section 181.

This section is the same as section 1351 of the Consolidation Act (Laws 1882, chap. 410), which is the same as section 2953 of the Code of Civil Procedure, relating to justices' courts.

§ 182. **Old action; thereupon discontinued.**— Upon the delivery of the undertaking to the court, the action is discontinued, and each party must pay his own costs. If the plaintiff fails to deposit with the court a summons and complaint in the new action, before the expiration of twenty days after the delivery of the undertaking, the defendant may main-

tain an action against the plaintiff to recover costs before the court.

Notes to section 182.

This section is the same as section 1352 of the Consolidation Act (Laws 1882, chap. 410) and section 2954 of the Code of Civil Procedure, applicable to justices' courts, with the provision as to costs omitted so as to conform to section 332, subdivision 2, of this act.

Costs after discontinuance upon answer of title.— See § 337.

§ 183. **Penalty for failure to deliver undertaking.**— If the undertaking is not delivered to the court, it has jurisdiction of the action, and must proceed therein, and the defendant is precluded in his defense, from drawing the title in question.

Note to section 183.

This section is the same as section 1353 of the Consolidation Act (Laws 1882, chap. 410) and section 2955 of the Code of Civil Procedure, applicable to justices' courts, with the exception of the word "justice" changed to the word "court."

§ 184. **Title appearing from plaintiff's own showing.**— If, however, it appears upon the trial, from the plaintiff's own showing, that the title to real property is in question, and the title is disputed by the defendant, the court must dismiss the complaint, with costs, and render judgment against the plaintiff accordingly.

Notes to section 184.

This section is the same as section 1354 of the Consolidation Act (Laws 1882, chap. 410) and section 2956 of the Code of Civil Procedure, relating to justices' courts, with the exception of the word "justice" changed to the word "court."

Dismissal.— In all cases, even where the defendant omits to plead title, if it appears on the trial, from the plaintiff's own showing, that the title comes in question, and shall be disputed by the defendant, the justice must dismiss the action. 11 Barb. 390, 20 Wend. 96, 6 Hill, 44, 271.

On a motion to dismiss, the defendant must specifically raise the point that the title to real property comes in question. *Brown* v. *Scofield*, 8 Barb. 239.

Costs where title to real property in question.— See § 338.

§ 185. **Same cause of action, and defense in new action.**— In the new action, to be brought after an action before a court is discontinued, by the delivery of an answer and an undertaking, as prescribed in the last six sections, the plaintiff must complain for the same cause of action only upon which he relied before the court, and the defendant's answer must set up the same defense only which he made before the court. If the action is to recover a chattel which was replevied in the municipal court, each undertaking, given in the municipal court, continues to be valid in, and is applicable to, the new action.

Note to section 185.

This section is the same as section 1355 of the Consolidation Act (Laws 1882, chap. 410) and section 2957 of the Code of Civil Procedure, applicable to justices' courts, except the word "justice" stricken out, and the word "court" changed therefor, and "justice's court" to "municipal court."

§ 186. **Answer to title interposed as to only one or more of several defenses; proceedings thereupon.**— Where in an action before the court, the plaintiff has two or more causes of action, and the defense that the title to real property will come in question, is interposed as to one or more, but not as to all of them, the defendant may deliver an answer and undertaking as prescribed in this article, with respect to the cause or causes of action only, in which title will so come in question. Whereupon the court must discontinue the action as to those causes of action only, the plaintiff may commence a new action therefor in the proper court, and the original action must proceed as to the other causes.

Note to section 186.

This section is the same as section 1356 of the Consolidation Act (Laws 1882, chap. 410) and section 2858 of the Code of Civil Procedure, applicable to justices' courts, with the exception of the word "justice" changed to "court," and this act is referred to.

§ 187. **Interpleader by order in certain cases.**— A defendant against whom an action to recover upon a contract, or an

action to recover a chattel, is pending, may, at any time before answer, upon proof, by affidavit, that a person, not a party to the action, makes a demand against him for the same debt or property, without collusion with him, apply to the court, upon notice to that person, and the adverse party, for an order to substitute that person, in his place, and to discharge him from liability to either, on his paying into court the amount of the debt, or delivering the possession of the property, or its value, to such person as the court directs; or upon it appearing that the defendant disputes, in whole or in part, the liability as asserted against him by different claimants, or that he has some interest in the subject matter, of the controversy which he desires to assert, his application may be for an order joining the other claimant or claimants, as co-defendants with him in the action. The court may, in its discretion, make such order, upon such terms as to costs and payments into court of the amount of the debt, or part thereof, or delivery of the possession, of the property, or its value or part thereof, as may be just and thereupon the entire controversy may be determined in the action.

Notes to section 187.

This section is the same as section 820 of the Code of Civil Procedure, the words "or an action of ejectment" being omitted, because this court has no jurisdiction in such an action.

Commission to take testimony.— In an action to procure an interpleader, where one of the defendants denied the plaintiff's right to that relief, *held*, that a commission to take testimony out of the State might be issued, but the testimony must be confined to the questions arising on the right to interplead, and not upon the merits of the claim. *Kemp* v. *Dickinson*, 22 Hun, 593.

Discretionary.— The application is addressed to the discretion of the court, and ought not to be granted where it appears on the face of the papers that the claim of one of the claimants is clearly unfounded. *Pustet* v. *Flannelly*, 60 How. Pr. 67.

It must be shown that there is a reasonable foundation for the claim made by the proposed party, and that the stakeholder cannot determine which to pay to without peril. *Steiner* v. *East River Savings Institution*, 60 App. Div. 232, 70 N. Y. Supp. 223.

Doctrine.—As to the general doctrine of interpleader, see *Dows* v. *Kidder*, 84 N. Y. 121; *Barnes* v. *The Mayor*, 27 Hun, 236.

History or review of this subject by the courts. See the case of *Beer* v. *Bonner*, 11 Daly, 229.

Judgment creditors.— A defendant, sued for money collected by him as agent for the plaintiff's assignor, is not entitled to an order to interplead, upon an affidavit stating that other persons claim the same money under judgments against the assignor. *Delancy* v. *Murphy*, 24 Hun, 503; *Sigel* v. *Cohen*, 23 Misc. Rep. 368.

Order for practice.— Where an interpleader is ordered, the order should require the party brought in by the interpleader to appear and answer a complaint served upon him with the order, in the same time that a defendant is required to answer a summons, and should provide that the money in court shall be paid to the plaintiff in case of his failure to appear and answer. If the party appear and answer, the issue raised may be tried by the court, unless a jury be demanded at the joinder of issue. Upon the entry of a judgment the money must be paid to the prevailing party, unless an undertaking sufficient to stay proceedings be given and costs should be awarded against the losing party. *McElroy* v. *Baer et al.*, 13 Daly, 442.

Liability.— An interpleader by order will not be granted where the defendant contests his liability. *Brennan* v. *Liverpool & L. & G. Ins. Co.*, 12 Hun, 62. Or where he has a good defense as to one of the claimants. *Conner* v. *Weber*, 12 Hun, 580.

Life insurance.— Where the widow and an assignee of a deceased policyholder claimed the amount insured upon the life of the deceased by a life insurance company, and the latter sued the company, the widow was substituted as defendant by an order of interpleader. *Fowler* v. *Butterly*, 78 N. Y. 68. See also *Lateer* v. *Prudential Ins. Co.*, 64 App. Div. 423, 72 N. Y. Supp. 235.

Merchandise.— Where the plaintiff purchased from the defendant A. a quantity of merchandise, and the defendant R., the receiver of a corporation, presented a bill for the merchandise and demanded payment therefor, threatening to sue him for the amount,—*Held*, that an action for an interpleader would lie. *B. & O. R. R. Co.* v. *Arthur*, 10 Abb. N. C. 147.

Warehouseman.— The privilege of Laws 1895, chap. 633, relieving a warehouseman from being made a party to an action, unless he claims an interest other than a lien for warehouse charges, cannot be invoked by a party whom it is sought to bring in in the place of the warehouseman, as defendant. *Follett, etc.* v. *Albany, etc.*, 61 App. Div. 296, 70 N. Y. Supp. 474.

NOTE.— There are no sections from 187 to 193.

TITLE V.

Proceedings between Joinder of Issue and Trial.

Article I. Adjournments; subpœnas; attendance of witnesses.
II. Commissions and depositions.

ARTICLE I.

Adjournments; Subpœnas; Attendance of Witnesses.

Section 193. Trial may be adjourned, when.
194. Adjournment longer than eight days; undertaking.
195. Conditions may be imposed.
196. Attendance of witnesses.
197. How subpœna served.
198. Warrant of attachment against defaulting witness.
199. How executed; fees thereupon.
200. Defaulting witness liable for damages, and penalty of fifty dollars.

§ 193. **Adjournments; trial may be adjourned; when.**— The trial of the action may be adjourned by the court, or on the application of either party, for a period not exceeding eight days at any one adjournment, unless the defendant is under arrest, in which case it shall not be adjourned to exceed forty-eight hours, except upon the application of the defendant, in accordance with the provisions of section sixty-seven of this act. Except that an adjournment for more than forty-eight hours where the defendant is under arrest, may be granted on application of the plaintiff by discharging the defendant from custody and the action may then proceed notwithstanding such discharge; and the defendant shall be subject to arrest on the execution, in the same manner as if he had not been so discharged. The trial may be adjourned for a longer period by consent, or where neither party objects to the same, except as otherwise expressly prescribed in this act.

Notes to section 193.

This section is taken from sections 1362 and 1363 of the Consolidation Act (Laws 1882, chap. 410), which were the same as Laws 1857, chap.

344, §§ 25 and 26, changed to suit section 67, "Undertaking by arrested defendant on applying for adjournment," and also by adding to the end thereof the words "except as otherwise expressly prescribed by this act."

The following sections of this act also relate to adjournment:

Section 67, as above.

Section 194. "Adjournment longer than eight days; undertaking."

Section 195. "Conditions may be imposed."

Section 208. "Adjournment where commission granted."

Section 238. "Adjournments after return of jury."

Section 336. "Costs on adjournment."

Absence of a desired witness is not ground for claiming a postponement if there has been no subpœna or other effort made to secure his attendance. *Keller* v. *Feldman*, 29 Abb. N. C. 427; s. c., 49 N. Y. St. Rep. 718; *Cahil* v. *Hilton*, 31 Hun, 114.

Affidavits to obtain.— To entitle the defendant to demand an adjournment he must make an oath that he cannot safely proceed, for want of some material testimony or witness. *Lynsky* v. *Prendegrast*, 2 E. D. Smith, 43. No witness is a "necessary witness" unless he is a material witness, but a witness may be material without being a necessary witness, and other witnesses, also material, may prove the same facts. The party would be required to show that the witness was both a material and necessary witness (*Young* v. *Scott*, 3 Hill, 32); and this should be done by a statement of facts, and not as a mere opinion. *Murtha* v. *Walters*, 2 Sandf. 517; *Board of Excise of Saratoga* v. *Doherty*, 16 How. Pr. 46.

A party applying for a second adjournment must bring himself within the statute, and show affirmatively and satisfactorily that he has used due diligence to obtain the attendance of the absent witness. An affidavit alleging that the witness was not within reach of the process of the court on the day the affidavit was made is not sufficient. If the affidavit had alleged that the witness had been out of the reach of process since the last adjournment, it would be sufficient. *Christman* v. *Paul*, 16 How. 17.

An affidavit in support of a motion for postponement of a trial made by the sole defendant sued as indorser on a promissory note, which did not show that she was a necessary and material witness in her own behalf, that she had personal knowledge of any of the material facts or took part in any of the transactions or negotiations connected with the subject-matter of the action,—*Held* insufficient. *National Bank of Pensacola* v. *Anderson*, 55 App. Div. 570, 67 N. Y. Supp. 434.

Consent; objection.— On an appeal, though the record shows an adjournment for more than eight days, consent will be presumed unless the record shows an objection, and jurisdiction will be sustained. *Wood* v. *Spofford*, 29 Misc. Rep. 357, 60 N. Y. Supp. 492.

Costs.— Justice may impose costs on adjournment, but failure to pay them does not prevent defendant from taking part in the trial. Section 779 of the Code does not apply to this court. *Farber* v. *Hannan*, 30 Misc. Rep. 627.

Discretionary.— In general, a justice has a discretion as to adjournment, and only a clear abuse of that discretion will be error. *Onderdonek* v. *Ranlett*, 3 Hill, 323; *Irroy* v. *Nathan*, 4 E. D. Smith, 68; *Weed* v. *Lee*, 50 Barb. 354; *Rawson* v. *Grow*, 4 E. D. Smith, 18.

Refusal to allow an adjournment in the midst of a trial, to enable a party to procure the attendance of an expert in handwriting,—*Held* not erroneous, being discretionary. *Silver* v. *Elias*, 34 Misc. Rep. 760, 68 N. Y. Supp. 851.

Exception.— Denial of a motion to postpone a trial, made at the call of the day calendar, is not the subject of an exception. *Wilkins* v. *Beadleston & Woerz*, 33 Misc. Rep. 489, 67 N. Y. Supp. 683.

Length.— Unless a defendant executes an undertaking that he will pay any judgment which may be recovered against him in the action, the court has no power to grant him an adjournment for more than eight days. *Simon* v. *The Sheridan & Shea Co.*, 21 Misc. Rep. 489.

Not a matter of right.— A defendant upon return of summons is not entitled to an adjournment as a matter of right upon his request, without showing any reason therefor. *Rawson* v. *Grow*, 4 E. D. Smith, 18; *Ranney* v. *Gwynne*, 3 E. D. Smith, 59. Nor is he entitled to an adjournment as a matter of right, on the ground that his counsel is engaged in another court. *Ranney* v. *Gwynne*, 3 E. D. Smith, 59.

Trial from day to day.— The justice may continue the trial from day to day, or from one day to another day or days, until the same is finished. § 15.

§ 194. **Adjournment longer than eight days; undertaking.**— An adjournment may be had either at the joining of issue, or at any subsequent time to which the cause may stand adjourned on application of either party, for a period longer than eight days, but not to exceed ninety days from the return of the summons, upon executing an undertaking in writing, with one or more sufficient sureties, to the effect that he will pay to the plaintiff or defendant the damages, costs and extra costs, in case judgment shall be rendered against him in the action, upon proof by the oath of the party or otherwise, to the satisfaction of the court, that such party cannot be ready for trial before the time to which he desires an adjournment, for the want of material evidence, describing it; that the delay has not been made necessary by any

act or neglect on his part since the action was commenced, and that he expects to procure the evidence at the time stated by him. All bonds taken upon the adjournment of any cause shall be good and valid against the obligor or obligors, although subsequent adjournments are had after the execution of such bond or obligation.

Notes to section 194.

This section is the same as section 1364 of the Consolidation Act (Laws 1882, chap. 410), which is the same as Laws 1857, chap. 344, § 26.

More than eight days.— A party is not entitled to a longer adjournment than eight days without a proper affidavit, and giving security for his appearance and for payment of damages and costs. It seems that when such affidavit or security are given, the statute gives the justice no discretion, and the right to the adjournment is absolute. *Belshaw* v. *Colie*, 1 E. D. Smith, 213. See also *Irroy* v. *Nathan*, 4 E. D. Smith, 68.

Unless a defendant executes an undertaking that he will pay any judgment which may be recovered against him in the action, the court has no power to grant him an adjournment for more than eight days. *Simons* v. *The Sheridan, etc.*, 21 Misc. Rep. 489.

More than ninety days.— Adjournments of a cause by consent, aggregating more than ninety days, do not divest the justice of jurisdiction. *First Nat. Bank of Buchanan* v. *Smith*, 24 Misc. Rep. 709, 53 N. Y. Supp. 795.

§ 195. **Conditions may be imposed.**— The court may impose upon the party applying for an adjournment such conditions as to it may seem reasonable.

Notes to section 195.

This section is the same as section 1365 of the Consolidation Act (Laws 1882, chap. 410), and Laws 1857, chap. 344, § 28, except the word "court" is inserted for the word "justice."

Absent witness.— The justice may require the party to disclose what is intended to be proved by the absent witness, and if refused, the justice is fully warranted in denying the motion. *Irroy* v. *Nathan*, 4 E. D. Smith, 68.

§ 196. **Attendance of witnesses.**— A subpœna requiring a witness to appear and testify on the trial of an action, on

the demand of either party, shall be issued out of this court by the clerk thereof, in the district in which the action is pending, unless otherwise expressly provided in this act, and may be served at any place within the city of New York. The subpoena may require the witness, except as otherwise expressly prescribed by law, to bring with him any book or paper, relating to the merits of the action.

Notes to section 196.

This section is new, and is taken from section 1370 of the Consolidation Act (Laws 1882, chap. 410), and section 2969 of the Code of Civil Procedure, relating to justices' courts.

See tit. II, "Compelling the Attendance and Testimony of a Witness," §§ 852 to 869, Code Civ. Proc., and tit. IV, art. 2, "Compelling the Attendance of a Witness," §§ 2969 to 2979, Code Civ. Proc., relating to justices' courts.

This section 196 and the following four sections, 197 to and including section 200, are taken from said section of the Code applicable to justices' courts, principally sections 2969, 2970, 2971, 2972, and 2979.

Books; inspection of.— The action was to recover for money abstracted from the plaintiff's firm by the defendant, their bookkeeper, and the defense was that the money was taken with the plaintiffs' consent, under an agreement that the defendant was to have one-fourth of the profits. The defendant subpœnaed one of the plaintiffs with a *duces tecum* clause to produce the books of the firm, and on the affidavit of the attorney, that he believed that the *subpœna duces tecum* was served for the purpose of annoyance, and that it called for the production of from forty-five to fifty books, the *subpœna duces tecum* was set aside. *Held*, that the court erred in granting the application, and that, if the subpœna was too broad, the court should have required the plaintiffs to allow the defendant to inspect the books, or to furnish copies of the material portions thereof. *Clyde* v. *Rogers*, 24 Hun, 145; appeal dismissed, s. c., 87 N. Y. 625.

The actual production of books and papers may be controlled by the court, and if an order made for that purpose is oppressive, or if for any reason a party ought to be relieved from any or all of its provisions, the application should be made to the court wherein the order was made. *In re Kelly*, 11 Week. Dig. 308.

Corporation; books of; how produced.— See Code Civ. Proc., § 868, and *Wertheim* v. *Continental Ry. & T. Co.*, 3 Civ. Proc. Rep. 71.

Detention.— A witness is not to be unreasonably detained. Const. of 1894, art. 1, § 5.

Discharge of witness.— A witness once subpœnaed and called to testify upon a jury trial must remain until the trial is concluded,

unless discharged by consent or by the court. *Neil* v. *Thorn*, 88 N. Y. 270.

Excuse.— Belief that evidence of no benefit, no excuse. *Bonesteel* v. *Lynde*, 8 How. 226; *People* v. *Davis*, 15 Wend. 602.

Nonpayment of fees, good excuse for nonattendance. *Hurd* v. *Swan*, 4 Den. 75; *Bonesteel* v. *Lynde*, 8 How. 226, 352.

Poverty is no excuse, unless amounting to inability to pay expenses and provide for family. *People* v. *Davis*, 15 Wend. 602.

Nothing but extreme poverty, or inability to attend, or sickness of himself or family, will excuse nonattendance. *People* v. *Davis*, 15 Wend. 602.

A person subpœnaed to attend forthwith as a witness has a reasonable time to obey by means of ordinary methods. *People* v. *Potter*, 6 N. Y. St. Rep. 753. See also "Excuse for nonattendance," § 199.

Nonresident witness.—A nonresident witness coming here to attend court is privileged against either arrest or service of a summons; a resident witness or a nonresident party attending court is privileged against arrest only. *Jenkins* v. *Smith*, 57 How. 171. See *Frisbie* v. *Young*, 11 Hun, 474.

A witness attended at request of counsel. *Held*, that his attendance was voluntary, and he was not privileged from arrest. The statute only protects a witness attending under compulsion of a subpœna. *Hardenbrook's Case*, 8 Abb. Pr. 457.

A resident of another county while attending court here may be served with process where the court has jurisdiction, independently of service in New York city. *Sheldon* v. *Wakely*, 3 Law Bull. 94.

The exemption from service of process of a witness who comes from without the jurisdiction to attend a trial is a personal privilege only, which is waived if not taken at the first opportunity, and cannot be claimed for the first time on appeal from a judgment entered upon default. *Sebring* v. *Stryker*, 10 Misc. Rep. 289.

Notice to produce.— Where the plaintiff gives notice to the defendant that a document in his possession will be required at the trial, if necessary to contradict his evidence, he may give secondary evidence of the contents, without a notice to produce it. *Lawson* v. *Bachman*, 81 N. Y. 616.

In *Kerr* v. *McGuire*, 28 N. Y. 453, it was held notice to produce may be oral in presence of the court, as each party is at least presumed to have present all papers bearing on the case. See also *Hooker* v. *Eagle Bank*, 30 N. Y. 87.

Every inference warranted by the evidence may be drawn against the party who, knowing the truth and having the evidence, omits to produce it. *Wylde* v. *Northern, etc.*, 53 N. Y. 156. See pp. 163, 164; s. c., 14 Abb. Pr. N. S. 213.

Party refusing to produce a contract on notice, and parol proof being given, inferences are to be taken most strongly against him. *Cahen*

v. *Continental Life Co.*, 69 N. Y. 300, 309; *Wylde* v. *Northern, etc.*, 53 N. Y. 163, 164.

Officer of domestic corporation.— It is the duty of a person upon whom a *subpœna duces tecum* is served to obey it either personally or by a subordinate who is competent to identify and testify, and where he does so in person his attendance is not necessarily voluntary. *Sebring* v. *Stryker*, 10 Misc. Rep. 289.

Privileged from arrest.— Code Civ. Proc., § 860. A person duly and in good faith subpœnaed or ordered to attend, for the purpose of being examined, in a case where his attendance may lawfully be enforced by attachment or by commitment, is privileged from arrest in a civil action or special proceeding, while going to, remaining at, and returning from, the place where he is required to attend.

Public officer.— Personal attendance of, not required. The book or paper may be produced by subordinate or employee. See Code Civ. Proc., § 869.

Records not to be removed by virtue of subpœna.— Code Civ. Proc., § 866.

Subpœna duces tecum; production of books of account and how a witness may be relieved therefrom. See Code Civ. Proc., § 867.

Not necessary when witness admits possession in court of written instruments. *Boynton* v. *Boynton*, 25 How. 490; s. c., 16 Abb. 87, 41 N. Y. 619.

§ 197. **How subpoena served.**— A subpoena may be served by any person over the age of eighteen years, and must be served by delivering a copy thereof to the witness personally, and by paying or tendering to him his lawful fee of twenty-five cents for one days attendance as a witness, and mileage as provided by the code of civil procedure.

Notes to section 197.

This section is new and is taken from section 1370 of the Consolidation Act (Laws 1882, chap. 410), and section 2970 of the Code of Civil Procedure, relating to justices' courts.

This section specifies the amount of witness fees, but does not specify the amount of mileage, except to say "as provided by the Code of Civil Procedure."

The Code of Civil Procedure as to "witness fees generally" is section 3318. Section 352 of this act again specifies the amount of witness fees, and specifies the amount of mileage.

Fees.— A party is not entitled to witness fees for testifying in his own behalf. *Steers* v. *Miller*, 30 How. 7, affg. 28 How. 266.

One who attends in two causes may have fees in both. *Hicks* v. *Brennan*, 10 Abb. 304; *Vence* v. *Spier*, 18 How. 168.

A witness served with a *subpœna duces tecum* is entitled only to the ordinary witness fees. *In re Corwin*, 6 Abb. N. C. 437.

Waiver of fees must be express in order to subject the witness to penalty for nonattendance. An implied waiver is not sufficient. *Muscott* v. *Runge*, 27 How. Pr. 85.

A witness is not bound to refund fees paid him upon the service of subpœna, because the cause is settled or put off, and he is notified that he need not attend. *Ford* v. *Monroe*, 6 How. Pr. 20; s. c., 10 N. Y. Leg. Obs. 155.

Habeas corpus to testify (see Code Civ. Proc., § 2010) may also be issued by a justice of the Supreme Court, upon the application of a party to an action pending before a justice of the peace or in a justice's court of a city, or a District Court of the city of New York.

Mileage.— If a witness resides more than three miles from the place of attendance, he is entitled to eight cents for each mile, going to the place of attendance. § 352 of this act (Code Civ. Proc., § 3318).

§ 198. **Warrant of attachment against defaulting witness.**— Where it is made to appear, to the satisfaction of the court, by affidavit or other proof, that a person duly subpœnaed to attend before it in an action, has refused or neglected to attend as a witness in obedience to the subpœna, and no just cause for the neglect or refusal is shown to exist, and the person is not privileged from attendance under any statute of the state, and the party, in whose behalf the witness was subpœnaed, or his attorney, makes oath that the testimony of the witness is material, the court must issue a warrant of attachment, directed generally to any marshal, for the purpose of compelling the attendance of the witness.

Notes to section 198.

This section is the same as section 2971 of the Code of Civil Procedure, relating to justices' courts, except that the word "justice" has been changed to the word "court," and "constable of the county" to "city marshal."

Excuse for nonattendance of witness; privilege of nonresident witness from service of summons and arrest and privilege of witness from arrest.— See notes to § 196.

See notes to § 200 as to "Compelling the attendance of witness" and "Fine and punishment."

§ 199. **How executed; fees thereupon.**— Such a warrant of attachment must be executed in the same manner as an order of arrest. The fees of the marshal for serving it must be paid by the person against whom it is issued, unless he shows a reasonable excuse to the satisfaction of the court, for his omission to attend, in which case the party procuring the warrant must pay them, and if he recovers costs, the amount thereof must be allowed to him as part of his costs.

Notes to section 199.

This section is taken from section 2972 of the Code of Civil Procedure, relating to justices' courts.

Sections 55 and 59, relating to proceedings on arrest, prescribe how the warrant must be executed.

§ 200. **Defaulting witness liable for damages and penalty of fifty dollars.**— A person subpœnaed, as prescribed in this act, who neglects or refuses to obey the subpœna, or to testify, is also liable to the party, in whose behalf he was subpœnaed, for all damages which the party sustains by reason of his neglect or refusal, and fifty dollars in addition thereto, and is subject to any fine or punishment which may be imposed in accordance with the provision of section eight of this act.

Notes to section 200.

This section is taken from section 2979 of the Code of Civil Procedure, relating to justices' courts. Section 8, therein referred to, relates to "Contempts punishable *civilly*" containing *seven* subdivisions as to the cases in which the court has power to punish by fine and imprisonment, or either, without *specifying what* the fine or imprisonment may be, as is specified in section 5 with regard to criminal contempts of court enumerated in section 4. The reading of the present section 200 is "and is subject to *any* fine or punishment which may be imposed *in accordance with the provisions* of section 8 of this act." We have endeavored to point out that there are no provisions in section 8 as to the *amount* of fine, or *limit* of the imprisonment as expressly specified in sections 4 and 5 with regard to "*Criminal* contempts."

The "proceedings to punish a contempt of court other than a criminal contempt" are to be found in title III, sections 2266 to 2292 of the Code of Civil Procedure. Section 2284 relates to the "*Amount of fine*," section 2285 to the "*Length of imprisonment*," etc., but these

provisions, by section 2266 of said Code, *apply to a court of record*, and there is no provision in the present act making them applicable to this court, except perhaps section 20, which is questionable.

It is true that these provisions of the Code (§§ 2266 to 2292) are not in conflict with the provisions of this act, and it may be therefore that this court has the power to punish for *civil* contempts under those sections of the Code the same as in a court of record, by virtue of section 20, but nowhere else in this act are those sections made to apply either directly or by implication. Subdivision 7 of section 8 is quite sweeping, but it only relates to any other *case* in addition to the other subdivisions in that section, and not to any *amount of fine* or *imprisonment* to be imposed.

Compelling the attendance and testimony of a witness.— See §§ 852 to 869, Code Civ. Proc., and "*Compelling the attendance of a witness*," §§ 2969 to 2979 of said Code.

Nonattendance of witness; remedies.— The remedies available to a party injured by the nonattendance of a witness discussed. *Courtney* v. *Baker*, 3 Den. 27.

To entitle plaintiff to recover he must prove that an action was pending in which the defendant might be a witness; that a subpœna was issued and served; that a payment of fees was made; that he was a material witness; that he did not appear; and damages. *Muscott* v. *Range*, 27 How. 85. See *Courtney* v. *Baker*, 3 Den. 27; *Carrington* v. *Hutson*, 28 Hun, 371. See also "*Excuse for nonattendance*," § 199.

Punishment of witness.— Statute must be strictly followed before warrant can issue. *Rutherford* v. *Holmes*, 66 N. Y. 368.

Refusal to produce papers.— Where plaintiff had been subpœnaed by the defendant to produce the bond in suit, the complaint was stricken out for a continuous refusal, by his counsel, to produce the bond, which he had in his pocket. *Shelp* v. *Morrison*, 13 Hun, 110.

No excuse that witness has lost or mislaid papers he was required to produce, where there is a deliberate design to elude the process of the court. *Bonesteel* v. *Lynde*, 8 How. 226, 352.

NOTE.— There are no sections from 200 to 205.

ARTICLE II.

Commission to Take Testimony; Depositions.

SECTION 205. Commission to take testimony, et cetera.
206. Commission on consent; deposition upon oral questions.
207. When and how commission granted.
208. Adjournment where commission granted.
209. How executed and returned.
210. Certificate of execution.
211. Certificate, a sufficient return.
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213. Deposition, et cetera, evidence.
214. Power of commissioners.
215. Receipt of clerk; return of commission by.
216. Deposition to take testimony conditionally.
217. Affidavit on application; requirements of.
218. Deposition by consent.
219. Order for examination.
220. Punishment for disobeying order, witness fees.
221. Service of order.
222. Adjournment of examination.
223. Party confined in prison.
224. Rules for examination; manner of taking and returning deposition; refusal of person examined to answer.
225. Deposition may be read in evidence; when.
226. Effect of deposition.

§ 205. **Commission to take testimony, et cetera.**— Where the defendant has neglected to appear upon the return of a summons, or has failed to answer the complaint, or where an issue of fact has been joined in an action; and it appears, by affidavit, upon the application of either party, that a witness, not within the city of New York, is material in the prosecution or defense of the action, the court may award a commission to one or more competent persons, authorizing them, or any of them to examine the witness under oath, upon interrogatories to be settled by the court, or by written agreement of the parties, and indorsed upon or annexed to the commission; to take and certify the deposition of the witness, and to return the same by mail, addressed to the clerk of the court.

Notes to section 205.

This section is taken from section 2980 of the Code of Civil Procedure, relating to justices' courts, which was made applicable to this court by section 1368, Consolidation Act (Laws 1882, chap. 410).

Authority to be strictly followed.— The power is statutory and to be strictly pursued. *Baron* v. *People*, 1 N. Y. 386; *Pendell* v. *Com.*, 20 N. Y. 134; *Fleming* v. *Hollenback*, 7 Barb. 271; *Creamer* v. *Jackson*, 4 Abb. Pr. 413; *Smith* v. *Randall*, 3 Hill, 495; *Collins* v. *Schaffer*, 29 N. Y. Supp. 574.

Clerk to open and file commission on its return.— See § 215.

Regarded as process and amendable.— The writ of commission is to be regarded as process, and is amendable wherever process is amendable. An amendment will be allowed whenever it is in furtherance of justice, if the court has jurisdiction of the action in which the amendment is sought to be made. The general subject of amending process at common law and under the statute discussed. *Leetch* v. *Atlantic Mutual Ins. Co.*, 4 Daly, 518.

Seal.— By section 18, this court has a seal; the courts of justices of the peace have no seal. There seems to be no express provision of law that the clerk or justice of the court should attach the seal of the court to the commission. It certainly is proper that courts having a seal should attach it to such an important paper as a commission going to a foreign State; courtesy, dignity, and authenticity require it, and it is held that when courts have a seal, and it is required to be placed upon a commission, the omission of the seal is a fatal objection to the legality of the commission. See *Ford* v. *Williams*, 24 N. Y. 349; *Tracy* v. *Suydam*, 30 Barb. 120; *Whitney* v. *Wyncoop*, 4 Abb. Pr. 370.

§ 206. **Commission on consent; deposition upon oral questions.**— If both parties expressly consent, a commission may issue without written interrogatories, and the deposition may be taken upon oral questions.

Note to section 206.

This section is taken from section 2981 of the Code of Civil Procedure, relating to justices' courts, which was made applicable to this court by section 1368 of the Consolidation Act (Laws 1882, chap. 410).

§ 207. **When and how commission granted.**— The commission may be granted by the court without notice, upon the application of the plaintiff, made at the return of the summons, or upon the application of either party, made at the time of the joinder of issue. It may also be granted at any

time after the joinder of issue, upon the application of either party, accompanied with proof, by affidavit, that three days written notice of the application has been served upon the adverse party, either personally or by service upon the attorney, who appeared for him before the court.

Notes to section 207.

This section is taken from section 2982 of the Code of Civil Procedure, relating to justices' courts, which was made applicable to this court by section 1368 of the Consolidation Act (Laws 1882, chap. 410).

Should be applied for promptly.— Its granting is almost a matter of course, but it should be applied for without unreasonable delay, after issue joined. *Rathbun* v. *Ingersoll*, 34 N. Y. Super. 211; *Brokaw* v. *Bridgman*, 6 How. 114.

Affidavit may be made by the attorney, or any third person cognizant of the facts. *Beall* v. *Day*, 7 Wend. 513; *Brackett* v. *Dudley*, 1 Cow. 210.

Discretionary.— The court, upon reasonable grounds being shown therefor, may order the party to disclose by affidavit what he expects to prove, and may then grant the order, either absolutely or conditionally, unless the adverse party will admit the facts sought to be proved; and he must admit the *facts*, not that the witness will testify to such facts. *Beall* v. *Day*, 7 Wend. 514.

The power to issue a commission is discretionary, and the justice may properly refuse to issue one when no possible benefit could accrue to the party applying for it; as for example, where the party applying declines to ask for an adjournment until the examination can be had, and a return thereto made. *Dryer* v. *Sexsmith*, 40 Hun, 242, 10 Civ. Proc. Rep. 29, 23 Week. Dig. 498.

Interpleader.— Where one of the defendants denied plaintiff's right to interplead, held, that a commission to take testimony out of the State might be issued, but the testimony must be confined to the questions arising on the right to interplead, and not upon the merits of the claim. *Kemp* v. *Dickinson*, 22 Hun, 593.

Security for costs as a condition.— The court may require security for costs in this court, under section 889 of the Code, as a condition of allowing plaintiff a commission to take testimony abroad; and such a condition is reasonable where plaintiffs have delayed their application without apparent cause, and their recovery is doubtful. *Hames* v. *Judd*, 16 Daly, 110.

§ 208. **Adjournment where commission granted.**— Where a commission is granted, the party upon whose application it is issued, is entitled to such an adjournment of the trial as

may be necessary to procure the commission to be executed and returned. Subject, however, to the provisions of sections one hundred and ninety-three and one hundred and ninety-four of this act.

Notes to section 208.

This section is taken from section 2983 of the Code of Civil Procedure, relating to justices' courts, which was made applicable to this court by section 1368, Consolidation Act (Laws 1882, chap. 410).

Sections 193 and 194 relate to "Adjournments."

Adjournment to plaintiff.— Where the application for commission is made by the defendant, or if no commission is issued, the justice has no right to grant plaintiff an adjournment; in so doing the adjourment is irregular, and the case will be out of court as between the parties. *Bedford* v. *Snow*, 12 N. Y. St. Rep. 323, 46 Hun, 370.

No adjournment can be had on the application of the plaintiff, except at the first return of the summons, or when a commission is issued upon his application. *Bedford* v. *Snow*, 46 Hun, 370; *Crisp* v. *Rice*, 83 Hun, 466.

Witness in the city.— Where during the trial, after the completion of the reading of a deposition, it appeared the witness was then in the city, and there was no evidence the party who read his deposition knew it, he was not obliged to consent to an adjournment so that the witness might be subpœnaed. *Denny* v. *Horton*, 3 Civ. Proc. Rep. 255.

§ 209. **How executed and returned.**— The person, to whom a commission is directed, or before whom a deposition is taken, unless otherwise expressly directed in the commission, or in the order for taking the depositions, must execute the commission, or the order as follows:

1. He must publicly administer, to each witness examined, an oath or affirmation to testify the truth, the whole truth, and nothing but the truth, as to the matters respecting which the witness is examined.

2. He must reduce the examination of each witness to writing, or cause it to be reduced to writing, by a disinterested person. After it has been carefully read, to or by the witness, it must be subscribed by the witness.

3. If an exhibit is produced and proved, the exhibit, or, if the witness, or other person having it in his custody, does not surrender it, a copy thereof, must be annexed to the

deposition to which it relates, subscribed by the witness proving it, and numbered or otherwise identified, in writing thereupon, by the commissioner or other person taking the deposition, who must subscribe his name thereto.

4. The commissioner, or person taking the deposition, must subscribe his name to each half sheet of the deposition, and he must annex all the depositions and exhibits to the commission, or to a certified copy of the order for taking the deposition, with the certificate specified in the next section; and he must close them up under his seal, and address the packet to the clerk of the court, at his official residence.

5. If there is a direction, on the commission, or in the order to return the same through the post office, he must immediately deposit the packet, so addressed, in the post office, and pay the postage thereon.

6. If there is a direction on the commission, or in the order, to return the same by an agent of the party, at whose instance it was issued or granted, the packet so addressed must be delivered to the agent.

7. Where a commission is directed to two or more persons, one or more of them may execute it, as prescribed in this and the next section.

A copy of this and of the next section must be annexed to each commission, or order to take depositions, authorized by this article.

Notes to section 209.

This section is the same as section 901 of the Code of Civil Procedure. Section 1368 of the Consolidation Act (Laws 1882, chap. 410) made section 2984, Code Civil Procedure, relating to justices' courts, applicable to this court, and the latter section made section 901, Code of Civil Procedure, applicable.

Counsel at execution.— On the execution of a commission, the parties have a right to appear by counsel. *Union Bank of Sandusky* v. *Torrey*, 2 Abb. Pr. 269.

Delay in return.— Where sufficient time has elapsed, *prima facie*, to have the return, the stay will be vacated on motion, and the party who issued the commission must establish further grounds for a stay. *Voss* v. *Fielden*, 2 Sandf. 690.

Papers annexed.— If any writings are to be proved, they, or copies thereof, should be annexed for the purpose of reference, description, and identification, producing the original on the examination of the wit-

nesses. *Commercial Bank of Penn.* v. *Union Bank of New York*, 11 N. Y. 203.

The court has no power to order the original instrument to be annexed. *Butler* v. *Lee*, 32 Barb. 75; s. c., 19 How. 384.

§ 210. **Certificate of execution.**—The commissioner or other person, before whom one or more depositions are taken, must subscribe, and annex to each deposition, a certificate, substantially in the following form, the blanks being properly filled up:

State (or territory) of..... }
County (or parish) of..... } ss.:

I, ... do certify that ..... the witness, personally appeared before me on the ..... day of ....., at ..... o'clock in the .....noon, at the ....., in the state (or territory) of ....., and after being sworn (or affirmed, as the case may be), to testify the truth, the whole truth, and nothing but the truth, did depose to the matters contained in the foregoing deposition, and did, in my presence, subscribe the same, and indorse the exhibits annexed thereto. And I further certify that I have subscribed my name to each half sheet thereof, and to each exhibit.

And I further certify that ..... appeared in behalf of the ..... and that ..... appeared in behalf of the .....

Note to section 210.

This section is the same as section 902 of the Code of Civil Procedure. Section 1368 of the Consolidation Act (Laws 1882, chap. 410) made section 2986, Code of Civil Procedure, relating to justices' courts, applicable to this court, and the latter section made section 902, Code of Civil Procedure, applicable.

§ 211. **Certificate, a sufficient return.**— The certificate specified in the last section, is a sufficient return to a commission.

Note to section 211.

This section is the same as section 903 of the Code of Civil Procedure. Section 1368 of the Consolidation Act (Laws 1882, chap. 410) made

section 2986, Code of Civil Procedure, relating to justices' courts, applicable to this court, and the latter section made section 903, Code of Civil Procedure, applicable.

§ 212. **When deposition may be suppressed.**— Where it appears, by affidavit that a deposition has been improperly or irregularly taken or returned; or that the personal attendance of the witness, upon the trial, could have been procured, with due diligence, by a subpœna, or that the attorney for either party has practiced any fraud, or unfair or overreaching conduct, to the prejudice of the adverse party, in the course of the proceedings; an order for the suppression of the deposition, may be made by the court, upon the application of the party aggrieved, upon notice to the adverse party.

Notes to section 212.

This section is entirely new to this court, and is the same as section 910 of the Code of Civil Procedure. Heretofore there was no power in this court to suppress a deposition. Section 910 was not included in section 1368 of the Consolidation Act (Laws 1882, chap. 410), or included in any of the sections of the Code of Civil Procedure therein specified.

In *Denny* v. *Horton*, 11 Daly, 359, this was recognized, the court however saying the District Courts had the incidental power, by implication, given by the right to issue the commission.

Amending return.— If the commission be defectively executed the court has power to order it to be returned to have the defect amended, and it is not necessary to issue a new commission. *Sheldon* v. *Wood*, 2 Bosw. 267.

Directions from plaintiff to witness.— Where it appears that the testimony taken was given under written memoranda, in directions sent to him in behalf of a plaintiff before his deposition was taken, the judge has the power to suppress it. *Nordlinger* v. *Anderson*, 24 N. Y. St. Rep. 240.

Mistake in name of the witness.— In the affidavit the name being George C. Fox and in the commission Frank C. Fox is an irregularity. See *Denny* v. *Horton*, 11 Daly, 358.

Letters for identification.— Upon the taking of a deposition, out of the State, letters which are merely identified before the commissioner are not to be considered as having been "produced and proved" within the meaning of section 901 of the Code of Civil Procedure, or of the Revised Statutes, as exhibits, and need not be annexed to the commission. Such identification is not enough to admit them at the trial, with-

out evidence of genuineness by witnesses, who can be cross-examined. That such letters have not been annexed to the deposition is therefore not a sufficient ground for suppressing the commission. *Kelly* v. *Weber*, 9 Abb. N. C. 62.

There are notes and authorities at the end of this case.

Objection to evidence, taken under a commission, *that the commission was not executed by the person intended*, should be raised by motion to suppress where the party has an opportunity so to do; if not so raised it will be deemed to have been waived; it cannot be raised, upon the trial, where the party had knowledge of the fact a sufficient time before the trial to enable him to make the motion. *Newton* v. *Porter et al.*, 69 N. Y. 133.

Order suppressing the deposition must be obtained or it can be read in evidence. *Hedges* v. *Williams*, 33 Hun, 546; *Denny* v. *Horton*, 11 Daly, 358.

Second commission.— The court will sometimes allow a second commission to issue. *Fisher* v. *Dale*, 17 Johns. 342; *Washington Bank* v. *Palmer*, 2 Sandf. 686, 690.

§ 213. **Deposition, et cetera, evidence.**—A deposition, taken and returned as prescribed in this article, may, unless it is suppressed as prescribed in the last section, be read in evidence by either party. It has the same effect, and no other, as the oral testimony of the witness would have; and an objection to the competency or credibility of the witness, or to the relevancy, or substantial competency, of a question put to him, or if an answer given by him, may be made, as if the witness was then personally examined, and without being noted upon the deposition.

Notes to section 213.

This section is the same as section 911 of the Code of Civil Procedure. Section 1368 of the Consolidation Act (Laws 1882, chap. 410) made section 2986, Code of Civil Procedure, relating to justices' courts, applicable to this court, and the latter section made section 911, Code of Civil Procedure, applicable.

Competency of witness is determined by the law in force at the trial. *Fielden* v. *Lahens*, 6 Abb. Pr. N. S. 341.

General interrogatory.— Neither the general interrogatory nor any pertinent answer to it is immaterial. *McCarthy* v. *Edwards*, 24 How. 236; *Percival* v. *Hickey*, 18 Johns. 257.

Impeaching witness.— Rule that witness cannot be impeached by proof of other statements out of court applies to witness on commission. *Van Ness* v. *Bush*, 14 Abb. 33; s. c., 22 How. 481.

Irresponsive answer.— An answer not responsive to an interrogatory may be objected to by either party on the trial, and will thereupon be excluded. *Lansing* v. *Coley*, 13 Abb. Pr. 272.

But testimony otherwise competent will not be rejected at the trial because not responsive. *Fassin* v. *Hubbard*, 55 N. Y. 465.

Knowledge of witness.— Where a witness testifies positively to facts which may be within his personal knowledge, and the opposite party makes no inquiries to ascertain whether they were so or not, the court must assume that the witness speaks from such knowledge. This rule applies as well where the testimony of the witness is taken upon commission as to an oral examination. *Fassin et al.* v. *Hubbard*, 55 N. Y. 466.

Leading questions.— The objection to an interrogatory annexed to a commission, on the ground of its being leading, may be made when the answer of the witness is proposed to be read in evidence. *Fleming* v. *Hollenback*, 7 Barb. 271.

Materiality.— The issuance of the commission determines the materiality of the witness to be subpœnaed. *Wintenbrock* v. *Mabius*, 57 Hun, 146; s. c., 10 N. Y. Supp. 733.

Objections to testimony.— Incompetent matter contained in an answer to an interrogatory annexed to a commission executed without the State may be objected to for the first time on the trial, although the objection was not taken upon the settlement of the interrogatories, or by motion to suppress the commission. *Wanamaker* v. *Megraw*, 168 N. Y. 125, 61 N. E. 112, revg. 48 App. Div. 54.

Objections must be specific.— Objections taken at the trial must be specific. *Valton* v. *Nat. F. L. Assn.*, 20 N. Y. 32.

Order for suppression of depositions; when not obtained.— Section 910 of the Code has not changed the former practice when no order for the suppression of the depositions has been obtained, and that allowed them to be used as evidence, even if the personal attendance of the witness could be secured. *Hedges* v. *Williams*, 33 Hun, 546.

§ 214. **Power of commissioners.**— Where the commission is executed within the state, the commissioner, or if there are two or more, a majority of them, have the same power to issue a subpœna, to swear a witness, and to compel his attendance, that a justice of the peace has, in an action pending before him.

Note to section 214.

This section is the same as section 2987 of the Code of Civil Procedure, relating to justices' courts, which was made applicable by section 1368 of the Consolidation Act (Laws 1882, chap. 410).

§ 215. **Receipt of clerk; return of commission by.**— The clerk of the court in the district in which the action is pending, must on receiving the package, containing the commission, transmitted to him by mail or otherwise, open and file it, indorsing thereupon the date of his so doing. It must remain on file with him, until the trial; but either party is entitled to inspect it on file.

Note to section 215.

This section is the same as section 2987 of the Code of Civil Procedure, relating to justices' courts, which was made applicable by section 1368 of the Consolidation Act (Laws 1882, chap. 410).

§ 216. **Deposition to take testimony conditionally.**— Either party to an action pending in the municipal court may apply in the district in which the action is pending, for an order to have the testimony of any witness who is about to depart from the city of New York, and will probably continue absent, when the testimony is required, or is so sick or infirm as to afford reasonable ground to believe that he will not be able to attend the trial; or that any other special circumstances exist which render it proper that he be examined as prescribed in this article, taken conditionally to be used on the trial of such action, subject to the provisions of this article.

Notes to section 216.

This section is taken from section 1369 of the Consolidation Act (Laws 1882, chap. 410), and from section 871 of the Code of Civil Procedure, which was made applicable to this court by said section 1369 of the Consolidation Act.

Section 1369 makes sections 871 to 883, Code of Civil Procedure, applicable to this court, and all of them have been embodied into this act, except section 876, as follows: Section 216 of this act is taken from section 871, Code; section 217 from 872; section 218 from 879; section 219 from 873; section 220 from 874; section 221 from 875; section 222 is new; section 223 from 877; section 224 from 880; section 225 from 881 and 882, and 226 from 883.

Framing complaint.— A witness cannot be examined under sections 871 to 876 of the Code of Civil Procedure, for the purpose of enabling the plaintiff to frame a complaint in an action which is not yet commenced. *Matter of Anthony*, 42 App. Div. 66.

§ 217. **Affidavit on application; requirements of.**— The party desiring to take a deposition, as prescribed in the last section, must present to the court in the district in which the action is pending, an affidavit showing:

1. The title and nature of the action. The name and residence of the person to be examined. That the testimony of such person is material and necessary for the party making such application or for the prosecution or defense of such action.

2. That the person to be examined is about to depart from the city of New York, or that he is so sick or infirm as to afford reasonable ground to believe that he will not be able to attend the trial, or that any other special circumstances exist which render it proper that he should be examined, as prescribed in this chapter; but this subdivision does not apply to a case where the person to be examined is a party to the action, except in the case of sickness or infirmity.

3. If the party sought to be examined is a corporation, the affidavit shall state the name of the officers or directors thereof, or any of them whose testimony is necessary and material, or the books and papers as to the contents of which an examination or inspection is desired, and the order to be made in respect thereto, shall direct the examination of such persons and the production of such books and papers.

Notes to section 217.

This section is constructed from section 872 of the Code of Civil Procedure, which was made applicable to this court by section 1369 of the Consolidation Act (Laws 1882, chap. 410).

Affidavit must conform strictly to section 872 in all matters of substance, although a trifling change of expression will not vitiate. *Beech* v. *Mayor*, 14 Hun, 79; s. c., 4 Abb. N. C. 236; *Ludewig* v. *Pariser*, 4 Abb. N. C. 246; *Matter of Bryan*, 3 Abb. N. C. 289; *Dunham* v. *Merchants' M. Ins. Co.*, 6 Abb. N. C. 70; *Greer* v. *Allen*, 15 Hun, 432. See also rule 89, Supreme Court.

It may be made by the parties, agent or attorney, if good reason be shown. *Corbitt* v. *De Comeau*, 54 How. 506; *Borman* v. *Pierce*, 56 How. 251; *Hynes* v. *McDermott*, 55 How. 259; *Hale* v. *Roger*, 22 Hun, 19; *Corbitt* v. *De Comeau*, 4 Abb. N. C. 252; *Lane* v. *Williams*, 22 Week. Dig. 16.

The affidavit should show the witness is then sick, and that what is expected to be proven is derived from knowledge, fact, or circumstance, showing a reasonable ground for the expectation, with reference to the testimony to be given. See *Johnson* v. *New Home S. M. Co.*, 62 App. Div. 157, 70 N. Y. Supp. 875. See also *F. L. & T. Co.* v. *Siefke*, 144 N. Y. 355.

§ 218. **Deposition by consent.**— The parties to an action may stipulate in writing that an order specified in section two hundred and sixteen of this act may be granted, in which case an affidavit, as required by the preceding sections shall not be necessary. But this section does not apply to a case where the person to be examined is confined in a prison or jail within the state.

Notes to section 218.

This section is taken from section 879 of the Code of Civil Procedure, which was made applicable by section 1369 of the Consolidation Act (Laws 1882, chap. 410).

As to taking deposition by agreement, see *Smith* v. *Servis*, 59 Hun, 552, 36 N. Y. St. Rep. 917.

§ 219. **Order for examination.**— The court to whom an affidavit is presented, as provided in section two hundred and seventeen of this act, may, if the opposing party or his representative is not present, require that a reasonable notice of the application be given, or may act on the application at the time of such presentation, and must grant an order for the taking of the deposition, if satisfied of the truth of the matter stated in the affidavit, and may in his discretion designate and limit the particular matters on which the examination is to be conducted. The order may require that the examination be conducted before the court, at the time fixed, or may permit such examination to be conducted at the place where the person to be examined is at the time fixed for said examination. Where the deposition is not taken in court, the order may permit the examination of the person making the deposition to proceed after having been sworn before an officer authorized to take and administer oaths.

Notes to section 219.

This section is taken from section 873 of the Code of Civil Procedure, which was made applicable to this court, by section 1369 of the Consolidation Act (Laws 1882, chap. 410).

Order is a matter of right, but in a proper case may be vacated by the court. For form of sufficient order see *Webster* v. *Stockwell*, 3 Abb. N. C. 115.

Vacating order.— See *Preston* v. *Heneker*, 9 Abb. N. C. 68; *Werthim* v. *Page*, 10 Week. Dig. 26; *First Nat. Bank* v. *Lindenmeyer*, 29 N. Y. St. Rep. 300; *Koehler* v. *Sewards*, 29 N. Y. St. Rep. 384, 8 N. Y. Supp. 504; *Cross* v. *National F. Ins. Co.*, 17 Civ. Proc. Rep. 199, 6 N. Y. Supp. 84; *Golin* v. *Town of Mooers*, 29 N. Y. St. Rep. 213.

§ 220. **Punishment for disobeying order; witness fees.**— Witnesses fees, as provided in this act, for attendance upon a trial, must be paid or tendered when the order is served upon the party or other person required to attend. If the party or person so served fails to obey the order his attendance may be compelled, and he may be punished in like manner, and the proceedings thereon are the same, as if he failed to obey a subpœna, issued from the municipal court.

Notes to section 220.

This section is taken from section 874 of the Code of Civil Procedure, which was made applicable to this court by section 1369 of the Consolidation Act (Laws 1882, chap. 410).

Compelling the attendance and testimony of a witness, and punishment.— See §§ 198 and 200 and notes.

Witness fees are twenty-five cents for each day's attendance, and if the witness resides more than three miles from the place of attendance to eight cents for each mile going to the place of attendance. See §§ 197 and 352.

§ 221. **Service of order.**— A copy of the order and of the affidavit upon which it was granted must be served at least two days before the time fixed for the examination, upon the attorney for each party to the action, in like manner as a paper in the action; or if a party has not appeared in the action they must be served upon him as directed by the order.

Notes to section 221.

This section is part of section 875 of the Code of Civil Procedure, which was made applicable to this court by section 1369 of the Consolidation Act (Laws 1882, chap. 410).

Service.— Where a party has appeared, service upon his attorney is sufficient, but he must be served personally, either with the order, or a subpœna, and witness fees must be paid, or tendered, before he can be punished for contempt in not attending. *Tebo* v. *Baker*, 16 Hun, 182; *Freiburg* v. *Branigan*, 3 Abb. N. C. 121; *Wood* v. *Keil*, 3 Abb. N. C. 122; *Pake* v. *Proal*, 2 Abb. N. C. 418; *Webster* v. *Stockwell*, 3 Abb. N. C. 115; *Thompson* v. *Sickles*, 3 Abb. N. C. 121, note; *Dunham* v. *Merchants' M. Ins. Co.*, 6 Abb. N. C. 70; *Mayer* v. *Knall*, 56 How. 214; *Riddle* v. *Crawl*, 5 Week. Dig. 277; *Tebo* v. *Baker*, 77 N. Y. 33; *Dudley* v. *N. Y. Press Club*, 53 Hun, 347; *Cowen* v. *Ferguson*, 7 N. Y. St. Rep. 403, 18 Abb. N. C. 241.

§ 222. **Adjournment of examination.**— The court may upon good cause shown adjourn the time for taking said examination within the limitations and provisions of this act applying to adjournments.

Notes to section 222.

The commissioners appointed to revise and codify the laws relating to this court, by chapter 218, Laws 1901, in their report to the Legislature, say: "The foregoing is a new section, *but its purpose is clear.* Nothing is said in this section about adjournments by consent, for the reason that such a privilege *might* be abused."

"Good cause shown."— This section does not prevent an adjournment by consent when so stipulated by the parties or their attorneys; that would be "good cause shown" for the justice to agree to the adjournment until there is abuse thereof, when there would be no longer "good cause shown." See *Keating* v. *Serrell*, 5 Daly, 278; *Barnes* v. *Badger*, 41 Barb. 98; *People ex rel. Struller* v. *McKean*, 27 Misc. Rep. 657; *Mayor* v. *Friedman*, 44 App. Div. 518; *Lett* v. *Stewart*, 62 N. Y. Supp. 1114.

§ 223. **Party confined in prison.**— Where the party or other person to be examined is confined in a prison or jail within the state, under sentence for a misdemeanor or felony, that fact must be stated in the affidavit, and his deposition may be taken as prescribed in the foregoing sections as if he was not so confined, except that in such a case the granting or refusing the order is always in the discretion

of the court. The order must require the production of the prisoner by the person in charge of the prison or jail, at the prison or jail, but it may prescribe such regulations and restrictions with respect thereto as the court deems proper.

Note to section 223.

This section is substantially the same as section 877 of the Code of Civil Procedure, which was made applicable to this court by section 1369 of the Consolidation Act (Laws 1882, chap. 410).

§ 224. **Rules for examination; manner of taking and returning deposition; refusal of person examined to answer.**— The deposition shall be in the form of question and answer, and when completed must be carefully read to and subscribed by the person examined; and within three days thereafter, unless sooner required by the order, must be filed in the office of the clerk of the district in which the action is pending, together with the stipulation or the affidavit on which the order was granted; and proof of the service of the order and of the affidavit. If upon an examination, the person examined refuses to answer, that fact must be reported to the court, which must determine whether the question was relevant and the witness bound to answer.

Notes to section 224.

This section is constructed from section 880 of the Code of Civil Procedure, which was made applicable to this court by section 1369 of the Consolidation Act (Laws 1882, chap. 410).

Objection; when to be taken.— Where the testimony of a witness is taken *de bene esse*, an objection to the form of the question asked him should be taken when the deposition is made. Any formal objection not taken before the officer taking the deposition will be deemed to have been waived. *Hebbard* v. *Haughian*, 70 N. Y. 54.

§ 225. **Deposition may be read in evidence; when.**— The deposition may be read in evidence, by either party at the trial of the action, if it be satisfactorily proved that the witness is dead or is unable to personally attend by reason of his insanity, sickness or other infirmity, or that he is confined in a prison or jail, or that he has been and is absent

from the city of New York, so that his attendance could not, with reasonable diligence be compelled by subpœna.

Notes to section 225.

This section is constructed from sections 881 and 882 of the Code of Civil Procedure, which were made applicable to this court by section 1369 of the Consolidation Act (Laws 1882, chap. 410).

Objections.— Objections of form must be taken at the time of taking the deposition, or else they are waived. This was the rule under the former statute, and no doubt is the same now. *Hibbard* v. *Haughian*, 70 N. Y. 54.

Oral examination may be had of the witness, and also his deposition read. *Misland* v. *Boynton*, 14 Hun, 625.

Waiver of irregularities.— See *Mayer* v. *Ehrlich*, 33 Hun, 2, 19 Week. Dig. 376; *Rushmore* v. *Hall*, 12 Abb. 420.

Correction of deposition.— The deposition may be returned to the commissioners for ratification. *Wells* v. *Hub Pub. Co.*, 12 Week. Dig. 425.

§ 226. **Effect of deposition.**— The deposition, so read in evidence has the same effect, and no other, as the oral testimony of the witness would have; and an objection to the competency or credibility of the witness, or to the relevancy or substantial competency of a question put to him, or of an answer given by him, may be made as if the witness was then personally examined and without being noted upon the deposition.

Note to section 226.

This section is the same as section 883 of the Code of Civil Procedure, which was made applicable to this court by section 1369 of the Consolidation Act (Laws 1882, chap. 410).

NOTE.—There are no sections from 226 to 230.

TITLE VI.

Trial; Trial Jurors.

SECTION 230. Issue of fact and law; judgment within what time to be rendered.
231. Trial by jury; drawing the jury.
232. Court may direct trial by jury; when.
233. Trial jurors; list of, to be furnished clerk of each district.
234. Jury of twelve; when.
235. How jury summoned; notice.
236. Talesmen.
237. Ballots of jurors summoned but not drawn.
238. Adjournments after return of jury.
239. Verdict; requisites.
240. Swearing the jury.
241. Submission of a controversy upon facts admitted.
242. Papers to be filed.
243. Subsequent proceedings regulated.

§ 230. **Issue of fact and law; judgment within what time to be rendered.**— Upon the issue of fact joined, if a jury trial be not demanded, as required by this act, the court must hear the evidence, and decide all questions of fact and law, and render judgment accordingly within fourteen days from the time the same is submitted for that purpose, except when the defendant is under arrest, and has not given security for his appearance; in such case the court shall render judgment immediately after the close of the trial, and except where further time is given by the consent of parties or their attorneys. All issues of law shall be heard and decided by the court, without a jury.

Notes to section 230.

This section is taken from section 1384 of the Consolidation Act (Laws 1882, chap. 410).

Since the year 1857 the "justice" had *eight* days to decide. Laws 1857, chap. 344, § 47. This section extends the time to *fourteen* days, which, in these days of speed, seems like retrogration.

As to "Judgment by default," see § 147.

As to "Offer to allow judgment," see § 148.

As to "Judgments," generally, see tit. VII, art. I, §§ 248 to 256, both inclusive.

After time limited for decision. — Judgment rendered after the time limited by law, or consent of the parties, is void for want of jurisdiction, and will be reversed. *Lambert* v. *Solomon*, 28 App. Div. 562, 59 N. Y. Supp. 676.

Consent to decide after the time limited by statute.— In the case of *Keating* v. *Serrell*, 5 Daly, 278, the court held that parties may, by stipulation, authorize the justice to render judgment after the expiration of the time limited by the statute. See also *Barnes* v. *Badger*, 41 Barb. 98; *People ex rel. Struller* v. *McKean*, 27 Misc. Rep. 657; *Mayor* v. *Friedman*, 44 App. Div. 518; *Litt* v. *Stewart*, 62 N. Y. Supp. 1114.

Failure to decide.— A justice loses jurisdiction unless his decision is rendered within the period prescribed by the statute. *Berrian* v. *Olmstead*, 4 E. D. Smith, 279; *Sibley* v. *Howard*, 4 Den. 72; *Wiseman* v. *Panama R. R. Co.*, 1 Hilt. 300; *Bremer* v. *Merrill*, 1 Daly, 485; s. c., 29 How. 259.

All jurisdiction terminates on the failure of the justice to decide the case within eight (now fourteen) days after it was finally submitted to him for decision, and in that case it abates within the legal meaning of that term as employed in an undertaking given to replevy a chattel. *Frost* v. *Kopp*, 13 Civ. Proc. Rep. 377, 13 N. Y. St. Rep. 707.

The justice must not only decide a case within eight (now fourteen) days after its submission, but must also deliver his decision to the clerk to be recorded; otherwise he loses jurisdiction, and plaintiff may commence a new action. *Dalton* v. *Loughlin*, 4 Abb. N. C. 187; *Ovis* v. *Curtis*, 28 N. Y. Supp. 728.

Mandamus.— In *The People ex rel. O'Neil* v. *Jerolomon, Justice, etc.*, Superior Court, Special Term, reported in the New York Law Journal, May 11, 1892, McAdam, J., wrote the following opinion: "A District Court justice must render judgment within eight (now fourteen) days after the cause is finally submitted. Cons. Act, 1882, § 1384. In this instance the justice filed the papers, with a written memorandum (purporting to dispose of the case), stating, in substance, that the plaintiff was a hard-working man, did not fully understand the purport of the papers which the defendant introduced at the trial, and that, under the circumstances, the justice deemed it proper to let the case go out of court without imposing any further loss on the plaintiff. This may seem equitable, but there is no warrant for such practice. Cicero, in one of his addresses to the jury, pointed out to them certain duties: 'They are to consider their duty not only a power, but a trust; it may be their duty to acquit their enemy and convict their friend; they must consider not what their own inclinations would lead them to do, but what the law and their oaths oblige them to do.' Ram on Facts, Townshend's Notes, 298. That the jus-

tice acted conscientiously and from goodness of heart goes without saying, but he had no such discretion in the premises as that he assumed to exercise. His duty is found in the statute — is mandatory — and can be discharged only by deciding the controversy according to his understanding of the evidence and the law applicable thereto, without sympathy or regard to results (however serious) to either litigant. Where a judicial duty is imposed, nothing must stand in the way of its complete performance. Every case must be decided on its merits and within the time prescribed by law, no matter how unpleasant the duty, which cannot be evaded. The responsibility and all it implies must be assumed, borne, and discharged. It follows that the relator is entitled to a mandatory writ requiring the justice to put his memorandum in legal form by deciding the issues submitted to him. This court does not direct the manner in which the justice shall dispose of the case — merely that he decide it in legal form in favor of one party or the other, so that the party aggrieved may appeal if he desires to do so. See 56 Hun, 626; s. c., 24 Abb. N. C. 477. No costs. The writ must be served on the justice and a copy thereof on the plaintiff. that he may have knowledge of the proceedings."

Retrial.— The court loses jurisdiction of a cause if the issues are not decided within the eight (now fourteen) days specified by statute, or within the time for which a stipulation extending the statutory limit of eight (now fourteen) days provide, and no decision being rendered, and no certificate for a jury trial being made, within the time, a trial had thereafter, against objection, is nugatory, and the objection must be sustained. *Samura* v. *Haggerty*, 30 Misc. Rep. 745, 62 N. Y. Supp. 1084.

Testimony admissible that decision not communicated to clerk within eight days.— As the rule that a failure of the justice to deliver his decision to the clerk, within eight (now fourteen) days after submission of the cause, is fatal to the jurisdiction of the court over the case, testimony is admissible that the decision of the justice was not communicated to the clerk within the time allowed. *Sire* v. *Merrick*, 15 Daly, 346.

Sunday.— If the last day fall on Sunday, judgment must be given on the preceding day. *Ready Roofing Co.* v. *Chamberlain*, 52 How. 123, 6 Daly, 521, 1 City Ct. Rep. 222.

Where the eighth (now fourteenth) day after the trial fell on Sunday, and the justice did not render his decision until the day following, he lost jurisdiction of the case, and the judgment was void. *Ready Roofing Co.* v. *Chamberlain*, 6 Daly, 521.

When sufficiently rendered.— A judgment is sufficiently rendered when an entry is made by the justice in his minutes, or a memorandum of it is made on the papers or copies thereof, if made in five days, al-

though no entry is made in the docket until afterward. *Risk* v. *Uffelman et al.*, 7 Misc. Rep. 133.

§ 231. **Trial by jury; drawing the jury.**— At any time when an issue of fact is joined, either party may demand a trial by jury, and unless so demanded at the joining of issue, a jury trial is waived. The party demanding a trial by jury shall forthwith pay to the clerk, the sum of four dollars and fifty cents. In default of which payment the court shall proceed as if no demand for trial by jury had been made. When a jury trial is demanded, the trial of the case may be adjourned within the limitations provided in this act, until the time fixed for the return of the jury. The clerk in each action or special proceeding, in which a jury trial is to be had, must publicly draw twelve persons from the undrawn jury box, and deliver the list thereof to a marshal, or to a person deputed by the court for that purpose, with a written or printed notice, directed to each person named in the list, requiring him to attend as directed as a juror, at a time specified therein, out of which number six of the persons attending shall be drawn to try the cause, provided that number appear.

Notes to section 231.

This section is taken from section 2990 of the Code of Civil Procedure, relating to justices' courts, and from the first paragraph of section 1372 of the Consolidation Act (Laws 1882, chap. 410), which latter was taken from Laws 1857, chap. 344, § 34. It also includes section 1377, Consolidation Act, which was Laws 1857, chap. 344, § 39.

As to jury trial in an action upon a bastardy or abandonment bond and upon the bond of a marshal, see notes to § 1, subds. 4 and 5.

The language at the beginning of this section is remarkable. It reads, "*At any time when* an issue of fact is joined, either party may demand a trial by jury." "At any time," means the time "*when*" an issue of fact is joined, and is the *only* time when the jury trial can be demanded. The reading of the former section 1372 is perfect. It reads, "A jury trial *must* be demanded *at the time of the joining of an issue* of fact," etc.

Demand must be made upon joining issue, with notice to opposite party, before adjournment. *Mead* v. *Darragh*, 1 Hilt. 395; *Shannon* v. *Kennedy*, 1 E. D. Smith, 346. See *Rubenstein* v. *Silberfeld*, 24 Misc. Rep. 201, 52 N. Y. Supp. 703.

Where, in consequence of the absence of the justice, the cause is, upon the return day, adjourned by the clerk, the proper time to demand a jury trial is after joining issue upon the adjournment day, and not upon the original return day of the summons. *Meech* v. *Brown*, 4 Abb. Pr. 19; s. c., 1 Hilt. 257.

On the return day of summons the defendant demanded a jury trial, and on the same day tendered the fees to the clerk, who declined to receive them, and directed defendant to pay them within five days before trial. A subsequent tender was refused as being too late. The justice, upon a submission of the question to him, directed the clerk to receive the sum tendered and issue a *venire*. *Held* no error; that at most the failure to strictly comply with the statute placed the parties in the same situation as if no demand for a jury trial had been made, and, in such case, the justice has power, under section 1372 of the Consolidation Act, as amended in 1891, in his discretion, to order a jury trial, the only requirement as to payment of fees in that event being that it should be made before rendition of judgment. *The Equitable Gas Light Co.* v. *French*, 10 Misc. Rep. 749.

Employee suing employer.— Although by section 44 an employee suing his employer for a sum less than $50 need pay no fees, yet if he wants a jury trial he must pay $4.50.

Jury fees.—For tabulated statement of, see notes to § 356.

Poor person may prosecute without paying any fees to any *officer*. Code Civ. Proc., § 461, made applicable by section 3347, subdivision 3, of said Code, as to demanding a jury trial. See notes to § 45.

Six jurymen.— The statute authorizing a trial by a jury of six, is not unconstitutional if it also allows the defendant the right to remove the cause to a court of record, where he could have a trial by a jury of twelve. *People ex rel. Metropolitan Board of Health* v. *Lane*, 6 Abb. Pr. N. S. 105.

Twelve jurymen; when.— See § 234.

Time of deposit.— Where, upon a proper demand and tender of fees for jury trial, the clerk directed the fees to be paid five days before the trial, and then upon a tender of such fees at that time refused the same as being too late, the justice directed the clerk to receive the fees and this was declared to be no error. *The Equitable Gas Light Co.* v. *French*, 10 Misc. Rep. 749.

Waiver.— A jury trial is waived and the right is gone unless demanded upon joining issue with notice to opposite party, and before adjournment. *Shannon* v. *Kennedy*, 1 E. D. Smith, 346; *Mead* v. *Darragh*, 1 Hilt. 395.

A party who has demanded a trial by jury may waive that mode of trial, by consent in open court. *Horsford* v. *Carter*, 10 Abb. Pr. 452.

Failure to pay the jury fees in season for the issuing of the *venire* is a waiver of the right to jury trial. *Kilpatrick* v. *Carr*, 3 Abb. Pr. 117.

After demanding a jury trial and adjournment of the cause to procure the jury, and on the adjournment day neglecting to appear, the justice can proceed to hear the cause without a jury. *Kilpatrick* v. *Carr*, 3 Abb. Pr. 117.

The plaintiff at the time of joining of issue demanded a jury trial, and paid the jury fee; after several adjournments of the cause, the case being called for trial, the plaintiff waived a jury, and against the objections of the defendants, the justice dismissed the jury and heard the cause alone. *Held* no error. *The N. Y. Dyeing & Printing Establishment* v. *Fox*, 6 Daly, 467.

§ 232. **Court may direct trial by jury; when.**— When an issue of fact has been joined in an action or special proceeding, and a trial by jury has not been demanded, the court may, in its discretion, at any stage of the action or proceeding, direct that a trial thereof be had by jury, and a trial by jury shall thereupon be had in the same manner as though either of the parties had demanded it, and the court shall require the fees for the jurors and for summoning them, to be paid by plaintiff and taxed as part of the costs. If after a trial shall have been had before the court, without a jury, the judge shall, within fourteen days after the submission of the case or proceeding, certify that the evidence is of such a conflicting nature that he has been unable to determine the issue of fact, and that he deems it proper that the same should be tried by jury, he may, by order set the same down for trial by a jury for a day not more than eight days from the time of the making of the order, and thereupon the action or proceeding shall be continued in court, and tried by jury as hereinbefore provided in the case where a trial by jury is ordered by the court before the trial.

Notes to section 232.

This section is taken from the second paragraph of section 1372 of the Consolidation Act (Laws 1882, chap. 410), which was taken from Laws 1857, chap. 344, § 47. It also includes section 1377, Consolidation Act, which was Laws 1857, chap. 344, § 34.

Judge has power to order a jury trial.— The "judge" has power, within eight (now fourteen) days after the conclusion of a trial before him, to direct a trial by jury. *Zemier* v. *Stearns*, 14 Misc. Rep. 7. See also *Equitable, etc.* v. *French*, 10 Misc. Rep. 749.

Second trial.— Where a judgment has been reversed and a new trial ordered, the justice has power, on the second trial, to direct that the trial be had by jury. *New York Small Stock Co.* v. *The Third Avenue R. R. Co.*, 16 Misc. Rep. 64.

After appeal and new trial ordered, a jury trial may be demanded. *Manheim* v. *Seitz*, 36 App. Div. 352, 55 N. Y. Supp. 321.

Stipulation by the parties that the justice may have additional time beyond the time required by law for his decision, after the submission of the case, in which to decide it,— *Held* to operate, also to extend the time within which to make a certificate that he was unable to decide it, and to order a jury trial. *People ex rel. Struller* v. *McKean*, 27 Misc. Rep. 659, 59 N. Y. Supp. 633.

§ 233. **Trial jurors; list of, to be furnished clerk of each district.**— A list of trial jurors for each district of the municipal court of the city of New York, must be selected by the commissioner of jurors or other officer whose duty it is by law to select jurors in each of the counties included within New York city, and must be selected for each of said districts by said officer in whose county the said district is situated, and must consist of two hundred jurors for each district. Each juror so selected shall be exempt from jury duty in every other court. A person shall not be placed upon such a list who does not reside, or have a place where he regularly transacts his business in person, within the district for which he is selected. The said commissioner of jurors or other officer shall on or before the first Monday in September in each and every year, furnish the clerk of the court in each of the districts of said court within the county for which said commissioner or other officer acts, with a list of the names, residence and occupation, of the persons liable to do jury duty, and who are borne upon said list. The clerk of the court who shall receive such jury list, must write on a slip of paper the name of each of the persons so furnished, and place the same in a box, to be called the undrawn jury box. The judge presiding in each district of said court may impose a fine of twenty-five dollars upon each person duly drawn and notified to attend the court as a trial juror, who fails to attend as required by the notice. The clerk of the court must, within ten days thereafter, transmit to the com-

missioner of jurors or other officer, a certificate showing that the fine has been so imposed, and stating how the notice to attend was served upon the delinquent, in order that the same proceedings may be had, as in the case of a delinquent juror in a court of record. A clerk who violates this section forfeits one hundred and fifty dollars for each offence.

Notes to section 233.

This section is taken from section 1371 of the Consolidation Act (Laws 1882, chap. 410), which latter section was substantially the same as section 1111, Code of Civil Procedure. It also includes section 1377, Consolidation Act, which was Laws 1857, chap. 344, § 39.

For other duties of the clerk, see article I, "Clerks and Officers." §§ 282 to 289.

False swearing; when perjury.— Any person who swears falsely in an affidavit, or testifies falsely upon an inquiry with regard to trial jurors, is guilty of perjury. Code Civ. Proc., § 1125.

Qualification, disqualification, and exemption of jurors.— See Code Civ. Proc., title IV. "Trial jurors in New York and Kings counties; mode of selecting them, and procuring their attendance." Sections 1079 to 1125, more particularly section 1079, "Qualification of trial jurors." Section 1081, "Persons exempt from service." See also title V, "Trial by Jury." Section 1166, "Persons drawn, etc., to form the jury," which is made applicable to *all* courts by section 3347, subdivision 14. Section 1166 also contains a provision as to persons who shall be disqualified from sitting as jurors. See also title III, "Trial Jurors, *except* in New York and Kings, Mode of Selecting Them, and Procuring Their Attendance." §§ 1027 to 1034.

By section 240 of this act, "the examination and swearing of the jury shall be the same as prevails in courts of record."

Service in a court not of record — when an excuse. Code Civ. Proc., § 1088. This section is seemingly in conflict with section 233, so that section 20 "governs." See § 20.

Penalty for physician giving false certificate for the purpose of discharging, excusing, or exempting a trial juror. See Code Civ. Proc., § 1120.

Punishment for bribery of officer, etc., by juror drawn.— Code Civ. Proc., § 1122.

Punishment for officer accepting bribes.— Code Civ. Proc., § 1123.

Id.; for concealing offer to take bribe, etc.— Code Civ. Proc., § 1124.

§ 234. **Jury of twelve; when.**— In an action where the damages, or the value of the chattels as claimed in the com-

plaint, exceed one hundred dollars, if at the time of joining an issue of fact the defendant demand a trial by a jury of twelve men, the court shall order a jury of twelve to be summoned to try the issues. In such case the clerk shall draw the names of twenty-four persons who shall be summoned in the same manner as in other cases required by law, and twelve of such number shall be drawn to try the cause. The jury fee to be deposited in such cases, shall be nine dollars.

Notes to section 234.

The commissioners say: "This section is substituted for section 1373 of the Consolidation Act" (Laws 1882, chap. 410), without mentioning that it is also a substitute for section 1369 of the Charter of 1897 (chap. 378), as amended by Laws 1901, chapter 466, which has been repealed by this act. In the table showing disposition of laws repealed, it is stated that section 1369 of the Charter has been disposed of by sections 4 to 8, inclusive, and subjects stated in that section.

By the Charter section 1369, in all actions specified in the Charter section 1364, except subdivision 8 (an action in behalf of the People of the State, etc.), and subdivision 10 (an action upon the bond of a marshal), where the damages, or the value of the chattels, exceeds $100, if a jury of twelve men had been demanded, the justice had to order the same, and the proceedings and fees were the same as prescribed in section 1373 of the Consolidation Act.

Section 1373 of the Consolidation Act was substantially Laws 1869, chapter 410, section 234; also includes section 1377 of the Consolidation Act, which was Laws 1857, chapter 344, section 39.

As to jury trial in an action upon bastardy or abandonment bond and upon the bond of a marshal, see notes to § 1, subds. 4 and 5.

As to "action to recover a chattel," see § 95.

Assent to a jury of twelve men.— See *Poyer* v. *N. Y. C. R. R. Co.*, 7 Abb. N. C. 371.

Constitutional right of jury trial by twelve men in justice's court. — See a decision made in the Oneida County Court in 1868, *Baxter* v. *Putney*, 37 How. Pr. 140.

Six jurymen.— See § 231 and notes.

Time of deposit for fee for six jurymen.— See § 231 and notes. The time of deposit for the jury fee of *twelve* jurymen is not expressed in section 234.

§ 235. **How jury summoned; notice.**— The officer or the person deputed, as provided in section two hundred and sixteen of this act, must thereupon immediately summon each

person named in the list, by giving him the sum of twenty-five cents and the notice mentioned in the last section but one, personally, or by leaving it at his place of residence or business, with some person of suitable age and discretion, and must return the list to the court, at its opening, on the day for which the jury was drawn, specifying the persons summoned, and the manner in which each was notified.

Notes to section 235.

This section is taken from section 1374 of the Consolidation Act (Laws 1882, chap. 410), which was substantially the same as section 35, chapter 344, Laws 1857. It also includes section 1377 of the Consolidation Act, which was Laws 1857, chapter 344, section 39.

The reference to section 216 in this section is an error. Section 216 provides for "Deposition to take testimony conditionally." The section intended is section 231.

§ 236. **Talesmen.**— If a sufficient number of competent and indifferent jurors do not attend, the court must direct to be summoned from the vicinity, sufficient to complete the jury, by a marshal or a person deputed for that purpose.

Note to section 236.

This section is the same as section 1375 of the Consolidation Act (Laws 1882, chap. 410), which is the same as section 37, chapter 344, Laws 1857. It also includes section 1377 of the Consolidation Act, which was Laws 1857, chapter 344, section 39.

§ 237. **Ballots of jurors summoned but not drawn.**— The ballots containing the names of the jurors summoned and not drawn, must be returned by the clerk to the undrawn jury box, to be drawn as in the first instance. The ballots containing the names of the jurors who served, must be placed in a box to be called the drawn jury box, until all the other names have been drawn therefrom, and, as often as that happens, the whole number must be returned to the undrawn jury box, as in the first instance.

Note to section 237.

This section is the same as section 1376 of the Consolidation Act (Laws 1882, chap. 410), which is the same as section 38, chapter 344,

Laws 1857. It also includes section 1377 of the Consolidation Act, which was Laws 1857, chapter 344, section 39.

§ 238. **Adjournments after return of jury.**— No adjournments can be granted after the return of the jury unless the party requiring the same in addition to the other conditions imposed upon him, deposit with the clerk the sum of four dollars and fifty cents or nine dollars as the case may be, but no jury fee or sum for summoning of jurors may be included as part of the costs in the judgment, other than the sum originally paid.

Notes to section 238.

This section is substantially section 1378 of the Consolidation Act (Laws 1882, chap. 410), which was Laws 1857, chapter 344, section 40. It also includes section 1377 of the Consolidation Act, which was Laws 1857, chapter 344, section 39.

The end of the section beginning with the words "but no jury fee," etc., is new, and means that only *one* fee for summoning jurors can be taxed, and that the fee paid for summoning another jury upon an adjournment cannot be taxed.

§ 239. **Verdict; requisites.**— Except as otherwise provided in this act, the verdict of the jury must be general for the plaintiff for a specific sum, or for the defendant, or where there is a counterclaim or set-off proved for the defendant in a specified sum, but where there are several plaintiffs or defendants, the verdict may be for or against one or more of them, within the limitations and provisions of this act, and the judgment must be entered thereon immediately after the rendering of the verdict.

Notes to section 239.

This section is taken from section 1380 of the Consolidation Act (Laws 1882, chap. 410), which was the same as section 42, chapter 344, Laws 1857.

By section 1, subdivisions 12 and 19, this court has power to direct or set aside the verdict of a jury and to grant a new trial, etc.

Absence of plaintiff.— Nothing less than express assent can warrant taking a verdict in plaintiff's absence. *People* v. *Mayor's Court of Albany*, 1 Wend. 36.

Altering verdict.— The verdict is not unalterable when entered in the clerk's minutes, even where it was brought in sealed, if the jury,

on being polled, dissent. Before they have been dismissed from their relation in the case as jurors, their power remains to alter the verdict so as to conform it to their real and unanimous intent. *Warner* v. *N. Y. Cent. R. R. Co.*, 52 N. Y. 437.

Delay in rendering judgment upon verdict.— Where the justice undertook to set aside the verdict rendered and refused to enter judgment, but several days afterward entered judgment upon it,—*Held* no error, since the requirement that judgment be entered immediately is directory merely. *Hecht* v. *Mothner*, 4 Misc. Rep. 536; s. c., 54 N. Y. St. Rep. 121, 24 N. Y. Supp. 826.

How judgment is entered.— Merely entering the verdict in the docket, and putting down the items of cost, and adding them up with the verdict, is not rendering a judgment on such verdict. Judgment must be rendered and entered in some way as a judicial act. *Stephens* v. *Santee*, 51 Barb. 532.

The clerk has no power to enter judgment upon the verdict of a jury, except by direction of the justice. The court must give the judgment. 4 E. D. Smith, 477.

Joint contract.— In an action on a joint contract the jury may find for one defendant who pleads infancy, and for plaintiffs against the others. *Hartness* v. *Thompson*, 5 Johns. 160.

Jurors dissent.— A jury, when they come to the bar, may dissent from the verdict to which they had previously agreed. No verdict is of force but a public one, given in open court, and till received and recorded it is no verdict. *Root* v. *Sherwood*, 6 Johns. 68; *Blackley* v. *Sheldon*, 7 Johns. 32.

Polling the jury.— Either party has an absolute right to have the jury polled on bringing in their verdict, whether it is sealed or oral, unless he has expressly waived it. *Laban* v. *Koplin*, 4 N. Y. 547; *Fox* v. *Smith*, 3 Cow. 23; *Jackson* v. *Hawkes*, 2 Wend. 619.

Regularity of verdict.— The fact that the jury attempted to communicate the verdict to the party in whose favor it was, after coming into court, and before the verdict was announced,—*Held* not to be considered as affecting the impartiality, regularity, or purity of the verdict, and it was not sufficient ground for setting aside the verdict. *Fash* v. *Byrnes*, 14 Abb. Pr. 12.

Replevin.—As to verdict or decision in actions in replevin, see § 121, and note § 1726, Code Civ. Proc., thereunder.

Waiver.— The rendering of a general verdict, and its reception without objection by the judge or the parties, is good, notwithstanding failure to find on special questions directed. A party, by so receiving it, waives objection. *Moss* v. *Priest*, 1 Robt. 632; s. c., 19 Abb. Pr. 314.

§ 240. **Conduct of trial.**— On the trial of all causes in the municipal court, the mode of conducting the trial, the

rules of evidence, the examination and the swearing of the jury, shall be the same as prevail in courts of record.

Notes to section 240.

This section is taken from section 1381 of the Consolidation Act (Laws 1882, chap. 410), which was the same as Laws 1857, chapter 344, section 44. It also includes section 1379 of the Consolidation Act, which was Laws 1857, chapter 344, section 41.

In the contents of title VI, "Trial; Trial Jurors," this section is entitled, "Swearing the jury," instead of "Conduct of trial."

The word "causes" is used instead of "actions" or "special proceedings," as used in the Code of Civil Procedure, and in other parts of this act.

For definition of the word "causes," see Bouvier's Dictionary, vol. I, p. 427; Wood on Civil Law, p. 301, and Funk & Wagnall's Standard Dictionary of the English language.

Account must have been ordered to be filed, and party precluded by order from giving testimony for failing to do so, to make the objection available to evidence on the trial. *Rosen* v. *Rosenthal*, 22 Misc. Rep. 143. See § 165.

Adjournment of trial.— See §§ 193, 194, 195, and notes.

Admissions.— No evidence can be received in favor of a party which tends to contradict an admission made by such party in his pleadings. *Crosly* v. *Lang*, 6 Bosw. 312.

When made at or before the submission of a cause it cannot subsequently be retracted. *Kohler* v. *Wright*, 7 Bosw. 318.

Testimony given by a party on a former trial, during which he was examined as a witness for the adverse party, and which is directly contrary to his testimony in a second suit, may be given in evidence as an admission. *Pickard* v. *Collins*, 23 Barb. 444.

A party to an action desiring to avail himself of an admission or an allegation contained in the pleading of his adversary must accept the admission or allegation as an entirety. *Shrady* v. *Shrady*, 42 App. Div. 9.

Admission by member of corporation. Code Civ. Proc., § 839.

Amendment of pleadings, etc. See § 166, and notes.

Argument.— Although a justice may, in his discretion, limit the time of a party's argument at the close of the trial, it is error to deprive him of that right altogether. *Cornwell* v. *Dickel*, 6 Civ. Proc. Rep. 416.

Attorneys and counselors not to disclose communications.— Code Civ. Proc., § 834. An attorney or counselor-at-law shall not be allowed to disclose a communication, made by his client to him, or his advice given thereon, in the course of his professional employment.

By section 836 of the Code of Civil Procedure, certain exceptions are made in this respect.

Bill of particulars must have been ordered filed, and party precluded by order from giving testimony for failing to do so, to make objection to evidence available on the trial. *Rosen* v. *Rosenthal*, 22 Misc. Rep. 143. See § 165, subds. 1 and 6.

Case closed.— After the day of the trial is passed, and the cause has been submitted, and the witnesses have departed, this court has no power to open a case for further hearing. *Harden* v. *Woodside*, 2 E. D. Smith, 37; *Alburtis* v. *McCready*, 2 E. D. Smith, 39; *Lawson* v. *Jones*, 12 Week. Dig. 551; *Schwartz* v. *Wechler*, 29 Abb. N. C. 332.

Cause of action, defense, proof, recovery.— *Quantum meruit* is recoverable, although complaint also alleges specific contract. *Sussdorf* v. *Schmidt*, 55 N. Y. 319.

Satisfaction of judgment, set up by defendant, may be impeached by plaintiff. *Mandeville* v. *Reynolds*, 5 Hun, 338.

Under allegation of contributory negligence, defendant allowed to prove contract. *Brown* v. *Elliott*, 4 Daly, 329.

Special contract, performed, provable under general complaint. *Higgins* v. *Newtown & Flushing R. R. Co.*, 3 Hun, 611.

Under a general denial in the answer, in an action for conversion, defendant may give evidence explaining his failure to deliver — *e. g.*, that he delivered to a third person, who, by the course of business between the parties, was apparently authorized to receive. *Ontario Bank* v. *N. J. Steamboat Co.*, 59 N. Y. 510.

True source of injury, admissible under general denial. *Schaus* v. *Manhattan Gas Light Co.*, 14 Abb. Pr. N. S. 371.

So of alteration after signature. *Boomer* v. *Koon*, 6 Hun, 645.

So of fact that contract was void against public policy and morals. *Russell* v. *Burton*, 66 Barb. 539.

Id.; failure to answer; motion to dismiss.— Failure of defendant to serve a verified answer when required does not preclude him from moving to dismiss the complaint as not stating a cause of action, and such motion is to be treated as a demurrer. *Morris* v. *Hunken*, 40 App. Div. 129, 57 N. Y. Supp. 712.

Certified copies of a paper on file in the office of the clerk shall be *prima facie* evidence thereof. § 289. See also latter part of § 15.

Certificate of copies, etc., for form of.— See Code Civ. Proc., § 957. It must be sealed (see Code Civ. Proc., § 858), unless it is in the same court (Code Civ. Proc., § 959).

Charge of the judge to the jury; additional requests.— Refusal of a trial justice to receive additional requests to charge, or to have them noted by the stenographer, *held* to require a reversal. *Munster* v. *Benoliel*, 33 Misc. Rep. 586, 67 N. Y. Supp. 1044, 9 N. Y. Annot. Cas. 190, revg. 32 Misc. Rep. 630, 66 N. Y. Supp. 493.

Id.; amount of damages.— A charge in a negligence case, brought in a city court for $2,000, the limit of the court's jurisdiction, that if the jury found any damages, it might be in any amount between one penny and $2,000, sustained. *Nash* v. *Yonkers R. R. Co.*, 63 App. Div. 315, 71 N. Y. Supp. 594.

Id.; credibility of witness.— A party who puts a witness on the stand presents him as credible, and he is not in a position to complain of a charge that the jury is not at liberty to disregard his testimony. *Crossman* v. *Lurman*, 57 App. Div. 393, 68 N. Y. Supp. 311.

Id.; inference.— It is only where the facts to be found will justify but a single inference, that the court is warranted as matter of law in directing a jury to draw such inference, if they find the testimony true. *Kellegher* v. *Forty-second St., Manhattanville, etc., Ry. Co.*, 56 App. Div. 322, 67 N. Y. Supp. 767.

Id.; necessity of objection.— Where a party has taken no exceptions to the charge and made request to charge, he is not in a position to insist upon a proposition which might have been so presented as controlling the disposition of the case by the jury. *Williams* v. *First National Bank of Syracuse*, 167 N. Y. 594, 60 N. E. 1122, affg. 45 App. Div. 239.

Id.; omission to charge.— A justice has the right to charge the jury, although it is usual to omit to do so; and his omission or refusal to charge, when requested, is not error. *Pettit* v. *Ide*, 12 Abb. Pr. 44.

Id.; requests to charge.— The court is not required to again charge a rule of law already stated, although the request was in slightly different language. *Wagner* v. *Buffalo & Rochester Transit Co.*, 59 App. Div. 419, 69 N. Y. Supp. 113.

Id.; refusal to charge.— "If upon the whole case the evidence is equally balanced, either upon the question of the defendant's negligence or the plaintiff's freedom from contributory negligence, they must find a verdict in favor of the defendant," where the evidence warrants, is error. *Schaefer* v. *Metropolitan Street Ry. Co.*, 34 Misc. Rep. 554, 69 N. Y. Supp. 980.

Refusal to charge in a negligence case, that if upon the whole case the evidence is equally balanced, either upon the question of defendant's negligence or of plaintiff's freedom from negligence, defendant must have the verdict, is error. *Brockman* v. *Metropolitan Street Ry. Co.*, 32 Misc. Rep. 728.

Id.; swearing falsely; interested witnesses.— A charge that "before they can reject the testimony of any witness in the case, the jury must be satisfied that the person willfully, knowingly, and corruptly swore falsely," without excepting the case of interested witnesses, is erroneous. *Biegelson* v. *Kahn*, 33 Misc. Rep. 610, 67 N. Y. Supp. 1112.

Clerks, etc., to search files, to certify, etc.— Code Civ. Proc., § 961.

Clergymen, etc., not to disclose confession.— Code Civ. Proc., § 833. A clergyman, or minister of any religion, shall not be allowed to disclose

a confession made to him, in his professional character, in the course of discipline, enjoined by the rules or practice of the religious body to which he belongs.

As to the application of this section and waiver thereof, see § 836, Code Civ. Proc.

Commission; deposition.— An order suppressing the same must be obtained, so it cannot be read in evidence. *Hedges* v. *Williams*, 33 Hun, 546; *Denny* v. *Horton*, 11 Daly, 358. And see § 212.

Contempt of court.— Criminal. See §§ 4 to 8. Contempts punishable *civilly*. See § 8.

Continuing trial.— By section 15 the trial of an action or special proceeding may be continued from day to day, or from one day to any other day or days until the same is finished. A *special proceeding* may be continued before *another justice*, but not *an action*.

Contract; law of place.— All matters bearing upon the execution, interpretation, and validity of contracts, including the capacity of the parties to contract, are determined by the law of the place where the contract is made. *Union Nat. Bank* v. *Chapman*, 169 N. Y. 538.

Copies of records and papers in certain offices; presumptive evidence. — Code Civ. Proc., § 933.

Id.; records of United States courts.— Code Civ. Proc., § 943. A copy of the record, or any other proceeding, of a court of the United States is evidence, when certified by the clerk or officer in whose custody it is required by law to be.

Corporation.— When proof of corporate existence unnecessary. See § 176 of this act, and § 1776, Code Civ. Proc.

Id.; admission by member of corporation.— Code Civ. Proc., § 839.

Counsel reading to the jury.— When counsel are permitted, under objection and exception, while summing up, to read to the jury an abstract from a pamphlet or newspaper, or to exhibit a cartoon, not in evidence, it is good ground for reversal. *Koelges* v. *Guardian Life Ins. Co.*, 57 N. Y. 638; *Williams* v. *Brooklyn Elevated Co.*, 126 N. Y. 96; *McKeever* v. *Weyen*, 11 Week. Dig. 258; *People* v. *Fielding*, 158 N. Y. 547.

Credibility of witness a question for the jury.— Although the evidence of defendant and her employee in an action for negligence based in part upon the personal omission of such employee are uncontradicted, their credibility presents a question for the jury. *Eastland* v. *Clarke*, 165 N. Y. 420, 59 N. E. 202.

Where a witness is interested in the issue on trial, his credibility is a question for the jury although he is not impeached or contradicted, and the court is not warranted in directing a verdict upon his testimony alone. The same rule applies to the testimony of two witnesses, both of whom are equally interested and testifying to the same facts. *Saranac & Lake Placid R. R. Co.* v. *Arnold*, 167 N. Y. 368, 60 N. E. 647, revg. 41 App. Div. 482.

The jury has the right to credit the testimony of plaintiff as against five witnesses produced by defendant. *Wheeler* v. *Metropolitan St. Ry. Co.*, 32 Misc. Rep. 764, 66 N. Y. Supp. 477.

Crime.— Conviction of, not to exclude witness. See § 832, Code Civ. Proc.

Cross-examination.— The court has power to restrain an abuse of the right of cross-examination, and to prevent an improper or vexatious delay in the progress of a trial, and it is the duty of the court to exercise that power, whenever the ends of justice require it. *Peck* v. *Richmond*, 2 E. D. Smith, 380; *Plato* v. *Kelly*, 16 Abb. 188.

In cross-examining a witness for the purpose of affecting his credit, great latitude is usually allowed to counsel. But where the sole object is to impeach the witness, and the matters inquired about are collateral, and not pertinent to the matter in issue, the extent is entirely discretionary with the court. *Allen* v. *Bodine*, 6 Barb. 383; *La Beau* v. *People*, 34 N. Y. 223; *Real* v. *People*, 42 N. Y. 270.

In an action on a contract for services as valet, *Held*, that it was reversible error to permit cross-examination of defendant concerning his relations with certain women. *Mowbray* v. *Gould*, 63 App. Div. 158, 71 N. Y. Supp. 365.

Default; judgment by.— *Verified complaint* not having been served with the summons, plaintiff cannot take judgment by default without proving his case. *Whitman, etc.* v. *Hamilton*, 27 Misc. Rep. 198, 57 N. Y. Supp. 760.

Defendant's failure to appear.— See § 147.

Demand for judgment.— On trial of issue of fact, prayer for relief not material. *Hopkins* v. *Lane*, 2 Hun, 38; *Caswell* v. *West*, 3 Sup. Ct. (T. & C.) 383.

Discontinuance.— The plaintiff, before the action is finally submitted, has a right to discontinue it; and it is the duty of the justice to give judgment, dismissing the action with costs, notwithstanding the defendant had interposed a counterclaim. *Bidwell* v. *Weeks*, 2 Hilt. 106; *Golding* v. *Victor*, 26 Misc. Rep. 728, 56 N. Y. Supp. 1044; *Rothenberg* v. *Filarsky*, 30 Misc. Rep. 610, 62 N. Y. Supp. 721; *Heineman* v. *Van Stone*, 34 Misc. Rep. 202, 68 N. Y. Supp. 803. An exception to refusal is necessary. *Transcendent L. Co.* v. *Steitz*, 35 Misc. Rep. 305, 71 N. Y. Supp. 947.

Direction of verdict.—Where, if the jury had rendered a verdict for plaintiff in a negligence case, the evidence suffices to sustain it, it is error to direct a verdict for defendant. *Tait* v. *Buffalo Ry. Co.*, 55 App. Div. 507, 67 N. Y. Supp. 403.

Defendant moved to dismiss the complaint, at the close of plaintiff's case, decision was reserved, defendant called a witness, did not renew his motion or ask that any question be submitted to the jury, and the court directed a verdict for plaintiff, to which defendant took no exception. *Held*, that there was no authority for filing a decision and

exception thereto. *Murray* v. *City of New York*, 60 App. Div. 541, 69 N. Y. Supp. 959.

Id.; where both parties move.— Both parties having requested the direction of a verdict, the court has the functions of a jury. *Cypress* v. *Haulenbeek Roasting & Milling Co.*, 34 Misc. Rep. 816, 69 N. Y. Supp. 650.

Disputed question of fact for the jury.— Whenever there is a disputed question of fact the case must go to the jury, though it is understood that a verdict for plaintiff will not be permitted to stand. *Marshall* v. *City of Buffalo*, 63 App. Div. 603, 71 N. Y. Supp. 719; *McConnell* v. *N. Y. Cent., etc., R. R. Co.*, 63 App. Div. 545, 71 N. Y. Supp. 616. It may be taken from the jury if the fact is either uncontradicted or the contradiction is illusory, or where the answering evidence is a scintilla merely. *Lawrence* v. *Wilson*, 64 App. Div. 562, 72 N. Y. Supp. 289.

Docket.— By section 285, the docket-books of this court, or a transcript thereof, certified by the clerk or his successor in office, with the seal of the court impressed thereon, are evidence to prove facts as stated therein.

Documentary evidence as a substitute for oral evidence.— Art. 1, §§ 921 to 931, Code Civ. Proc.

Estoppel of a former judgment extends to every material matter within the issues which was expressly litigated and determined and also to those matters which, although not expressly determined, are comprehended and involved in the thing expressly stated and decided, whether they were or were not actually litigated or considered. *Malone* v. *Weil*, 67 App. Div. 169.

Evidence; objections to.— The grounds of objection must be stated. *Pearson* v. *Fiske*, 2 Hilt. 146; *Fountain* v. *Pettee*, 38 N. Y. 184; *Staats* v. *Hudson River R. R. Co.*, 22 How. Pr. 463; *McCarty* v. *Edwards*, 24 How. Pr. 236, 20 Johns. 357, 5 Barb. 398, 8 N. Y. 442, 28 Barb. 462, 2 Abb. Pr. 271, note; *Mallory* v. *Perkins*, 9 Bosw. 572; *Button* v. *McCauley*, 38 Barb. 413.

Id.; order of.— It is a general rule that the time, manner, and order of receiving evidence is a matter of discretion with the judge. *Caldwell* v. *New Jersey Steamboat Co.*, 47 N. Y. 282; *Bedell* v. *Powell*, 13 Barb. 183; *Seeley* v. *Chittenden*, 4 How. 265.

Id.; party may be rebutted.— Code Civ. Proc., § 838. The testimony of a party taken at the instance of the adverse party, orally or by deposition, may be rebutted by other evidence.

Id.; rebutting is such as contradicts, modifies, explains, or varies the evidence of the other party. *Romertze* v. *East River Bank*, 2 Sweeny, 82; s. c., 49 N. Y. 577.

Exhibits.— A justice has no power, upon the trial of an action for breach of warranty of a chattel, to compel a party, or witness, to produce it in court for inspection. *Hunter* v. *Allen*, 35 Barb. 42.

Expiration of judge's term of office.— A justice cannot finish, after the end of his term of office, the trial of a case commenced before him, before the expiration thereof. *In re Rodding*, 14 Civ. Proc. Rep. 48. See also § 16.

Foreign corporation; book of.— When evidence. See Code Civ. Proc., § 929, and when a copy thereof is evidence, and how the copy is to be verified. See Code Civ. Proc., §§ 930, 931.

Foreign State, territory, or country.— The unwritten or common law of another State, or of a territory, or of a foreign country, may be proved as a fact, by oral evidence. § 942, Code Civ. Proc.

Former trial.— When testimony taken on, is admissible. See Code Civ. Proc., § 830; *Malcolm* v. *Weil*, 67 App. Div. 169.

Husband or wife.— When competent and incompetent witnesses. See § 831, Code Civ. Proc.

Immaterial variance in pleading to be disregarded.— See § 171; see also § 2943, Code Civ. Proc.

Improper statement made to the jury.—If the trial court seeks to correct improper statements made in the presence of the jury, the correction should be as broad as the error and cover substantially the same ground; and it does not cure the error unless it is sufficiently extensive, clear, and specific to repel the presumption of injury. *People* v. *Fielding*, 158 N. Y. 542, revg. s. c., 36 App. Div. 401.

Inspection of premises.— The trial judge, upon the trial of an action of trespass upon land in which the issue is the ownership as between plaintiff and defendants of the disputed premises, where the descriptions in the conveyances are not clear and the testimony makes the identity of the monuments uncertain, may, at the request of the respective parties and their counsel, and accompanied by them, make a personal examination of the premises. *Weiant* v. *Rockland Lake Trap-Rock Co.*, 61 App. Div. 383, 70 N. Y. Supp. 713.

Issues.— Where parties consent to litigate a claim before the justice of which he would have jurisdiction, no objection can be raised to his judgment on the ground that the issues were not within the pleadings. *Conyngham* v. *Shiel*, 20 Misc. Rep. 590.

Jurisdiction.— The fact that jurisdiction over the defendant does not appear is not available if not taken at the trial. *Hill* v. *Moebus*, 31 Misc. Rep. 134, 63 N. Y. Supp. 1022. See § 248, subd. 3.

Jurors and juries; challenge, grounds of.— See *Ayres* v. *Hammondsport*, 13 Civ. Proc. Rep. 236; *Hathaway* v. *Halimer*, 25 Barb. 201; *People* v. *Horton*, 13 Wend. 9; *Malloy* v. *Pelham*, 4 N. Y. St. Rep. 828.

Id.; Id.; peremptory challenge; number of.— By section 1176, Code of Civil Procedure, upon the trial of an issue of fact, joined in a civil action, *in a court of record*, each party may peremptorily challenge not more than *six*, and in a court *not of record*, each may peremptorily challenge not more than *three* of the persons drawn as jurors for the trial.

By section 1090, Code of Civil Procedure, the right of challenge to a particular juror at the trial is not impaired by the fact that the commissioner of jurors must alone decide upon the qualifications and exemptions of jurors, as provided in chapter X, title IV, article I, of the Code of Civil Procedure.

Id.; Id.; trial of.— Exceptions to and review of the determination of the court in reference thereto.— See Code Civ. Proc., § 1180. See *Mechanics & F. Bank* v. *Smith*, 19 Johns. 115; *Smith* v. *Floyd*, 18 Barb. 522.

Id.; Id.; waiver of.—See *Bennett* v. *Matthews*, 40 How. 428; *Hayes* v. *Thompson*, 15 Abb. N. S. 220; *Salisbury* v. *McCloskey*, 26 Hun, 262.

Id.; examination and swearing of the jury.—See notes to § 233, "Qualification, disqualification, and exemption of jurors."

Id.; instructions to jury.— On recovery of plaintiff for conversion of personal property, it is proper for the court to direct the jury to award interest on the amount recovered from the date of the conversion. *Einstein* v. *Dunn*, 61 App. Div. 195, 70 N. Y. Supp. 520.

Judicial notice.— What is. See *Hunter* v. *N. Y., O. & W. R. R. Co.*, 27 N. Y. St. Rep. 729, where the cases on this subject are collated.

Id.; justice has power to order.— By section 232, a justice has power, within eight days (now fourteen days) after the conclusion of a trial before him, to direct a trial by jury. See also *Zeimer* v. *Stearns*, 14 Misc. Rep. 7. The order is to set the case for trial within eight days. § 232.

Id.; marshal in charge of.— The jury must always be put in charge of a constable (marshal) sworn to attend them, unless they find a verdict without leaving their seats. And this, whether the jury retire from the court, or the court leaves them alone in the courtroom. *Douglass* v. *Blockman*, 14 Barb. 381.

Id.; oath to marshal.— You swear, in the presence of Almighty God, that you will, to the utmost of your ability keep the persons sworn as jurors in this trial, together in some private and convenient place, without any meat or drink, except such as shall be ordered by me; that you will not suffer any communication, orally or otherwise, to be made to them; that you will not communicate to them yourself, orally or otherwise, unless by my order, or to ask them whether they have agreed on their verdict, until they shall be discharged, and that you will not, before they render their verdict, communicate to any person the state of their deliberations, or the verdict they have agreed on. So help you God. 3 Rev. Stat. (6th ed.), § 101, p. 415; Hirsh on Juries, § 838, p. 241, and p. 320.

Id.; oath to.— You, and each of you, do swear, in the presence of Almighty God, that you will well and truly try the matter in difference between ———, plaintiff, and ———, defendant, and a true verdict will give according to evidence. So help you God. Hirsh on Juries.

Id.; not sworn.— The defendant moved to set aside the verdict for irregularity on the ground that one of the jurors upon the panel had not been sworn. *Held,* that such an omission, unaccompanied by injury or prejudice, was not a ground for setting aside a verdict. *Hardenburgh* v. *Crary,* 15 How. Pr. 307.

If a trial proceeds, and a verdict is rendered without a jury being sworn, such a verdict is not irregular and void, when neither party asked that the oaths should be administered. *Jenkins* v. *City of Hudson,* 2 How. N. S. 244, 8 Civ. Proc. Rep. 76, 16 Abb. N. C. 137.

Id.; objections; when to be made.— An irregularity in summoning the jury is good ground for challenge to the array, and must be made in the first instance. If no objection be made until after the jury are impaneled and sworn, it is too late. *Mayor of New York* v. *Mason,* 1 Abb. Pr. 352.

After the jury were sworn, but before the trial had commenced, the justice ordered some of the jurors to be withdrawn, and others substituted. His right to do so was considered doubtful, but it was held that the defendant, by not objecting at the time, waived his right to object. *Cook* v. *Ritter,* 4 E. D. Smith, 253.

Id.; taking out papers.— The judge has discretionary power to allow them to take with them any papers read in evidence, when they retire to deliberate on their verdict. *Howland* v. *Willetts,* 9 N. Y. 170; *Porter* v. *Mount,* 45 Barb. 422: *Schnappner* v. *Second Ave. R. R. Co.,* 55 Barb. 497.

Verdict set aside for delivery to jurors of a paper touching the issue. *O'Brien* v. *Merchants' Fire Ins. Co.,* 38 N. Y. Super. (J. & S.) 482.

It is not proper to allow the jury to take minutes of testimony kept by the counsel on one side. *Durfee* v. *Eveland,* 8 Barb. 46.

Id.; withdrawing.— A party surprised by evidence should ask to withdraw a juror. *Messenger* v. *Fourth Nat. Bank,* 48 How. Pr. 542.

Material variances between pleading and proof, how provided for. See § 172.

Mistakes, omissions, defects, and irregularities; and general regulations respecting bonds and undertakings.— Sections 728, 729, 730, and 810 to 816, inclusive, of the Code of Civil Procedure, apply to this court by subdivision 6 of section 3347 of said Code. See also § 20 of this act, making all sections of the Code applicable when they do not conflict with the provisions of this act.

By section 70 of this act, sections 106 to 110 and sections 127 and 128, relating to undertakings, sureties, and justification, are made applicable.

Motion to dismiss the complaint; cause of action; unverified answer. — Failure of defendant to serve a verified answer, when required, does not preclude him from moving to dismiss the complaint, as not stating a cause of action, and such motion is to be treated as a demurrer. *Morris* v. *Hunken,* 40 App. Div. 129, 57 N. Y. Supp. 712.

Id.; at close of case.— Failure to move to dismiss at the close of the case, or ask for a direction of a verdict, or object to the submission of the case to the jury, is a concession that there is evidence tending to prove the facts alleged, and precludes the party from claiming on appeal that the verdict is without evidence. *Sullivan* v. *Brooks et al.*, 10 Misc. Rep. 368.

Omission to move for a dismissal at the close of the evidence, or for the direction of a verdict, is an admission that there is a question of fact for the jury. *Brown* v. *Levi*, 34 Misc. Rep. 812, 68 N. Y. Supp. 941; *Kafka* v. *Levenson*, 18 Misc. Rep. 202; *Hendy* v. *Eagle*, 25 Misc. Rep. 472; *Hopkins* v. *Clark*, 158 N. Y. 299.

Id.; during the progress of the direct examination of a witness, — *Held* properly denied. *Winfield* v. *Potter*, 24 How. Pr. 446.

Exception to refusal to dismiss complaint.— An *exception* to a refusal to dismiss the complaint at the close of the plaintiff's case is not available where the motion is *not renewed* before the final submission of the case to the jury. *Scott* v. *Yeandle*, 20 Misc. Rep. 89.

Id.; grounds for, must be assigned.— The motion must assign grounds upon which it is based, it must point out the specific defect in the proofs. *Binsse* v. *Wood*, 37 N. Y. 526; *Kafka* v. *Levensohn*, 18 Misc. Rep. 202, 205; s. c., 41 N. Y. Supp. 368, 370; *The City of Buffalo* v. *N. Y., etc., R. R. Co.*, 152 N. Y. 276, 283.

Id.; on opening of the case.— On the dismissal of the complaint on the opening of the case it must be assumed that facts set out in the complaint and stated by the counsel are true. *Yapel* v. *N. Y., Ontario, etc., Ry. Co.*, 57 App. Div. 265, 68 N. Y. Supp. 292.

Id.; renewal of, at close of entire case.— The motion to dismiss complaint, made at the close of plaintiff's case, must be renewed at the close of the entire case, and a failure to do so is a concession that the case was properly one for the jury. *Barrett* v. *Third Ave. R. R. Co.*, 45 N. Y. 628; *Peake* v. *Bell*, 7 Hun, 454; *Clement* v. *Congress Spring Co.*, 91 Hun, 637; *Steinau* v. *Scherer*, 15 App. Div. 5, 7, 8; *Griffith* v. *Staten Island R. T. Co.*, 80 Hun, 141, 142; *Stewart* v. *Fidelity L. Assn.*, 19 Misc. Rep. 49, 51; *Schwinger* v. *Raymond*, 105 N. Y. 648; *O'Connell* v. *Samuel*, 81 Hun, 357; *Scott* v. *Yeandle*, 20 Misc. Rep. 89.

By a renewal of the motion to dismiss at the close of the whole case, defendant has the right to a ruling whether there is at that time evidence to go to the jury. *Apati* v. *Delaware, Lackawanna, etc., R. R. Co.*, 64 App. Div. 515, 72 N. Y. Supp. 322.

Id.; waiver.— Where a motion to dismiss the complaint for insufficiency of the evidence is denied, and the case submitted without objection from the plaintiff, such acquiescence on his part is equivalent to a consent that the cause be determined on the merits, and operates as a waiver. *Allen* v. *The Church of the Beloved Disciple*, 16 Misc. Rep. 584.

Motion to strike out.— When evidence tending to prove a material fact in issue is received under objection and requires proof of other facts to make it complete which have not been supplied, its presence in the record is no ground for reversal in the absence of a motion subsequently made to strike it out. *Hamel* v. *Brooklyn Heights R. R. Co.*, 59 App. Div. 135, 69 N. Y. Supp. 166.

No exception was taken to a ruling allowing a question objected to, but an exception was taken to a ruling denying a motion to strike out the testimony adduced. *Held*, that the refusal of the court to strike out was not error, but the remedy was to ask an instruction to the jury to disregard the evidence. *Smith* v. *Nassau Electric R. R. Co.*, 57 App. Div. 152, 67 N. Y. Supp. 1044.

When incompetent evidence has been received without objection, the court may, in its discretion, deny a motion to strike out such evidence, and the remedy of the party against whom the incompetent evidence is received is to request the court to instruct the jury not to consider it, which is his only recourse. *Meislahn* v. *Irving Nat. Bank*, 62 App. Div. 231, 70 N. Y. Supp. 988.

Negotiable paper; proof of lost.— Code Civ. Proc., § 1917. See also notes to § 1, subd. 1. See *Desmond* v. *Rice*, 1 Hilt. 330; *Frank* v. *Wessels*, 64 N. Y. 155.

This provision of the Code does not apply where the note was not lost, but was destroyed by fire. In that event the plaintiff can recover without giving a bond. *Scott* v. *Meeker*, 20 Hun, 161; *Hoxie* v. *Kennedy*, 10 N. Y. St. Rep. 786; *Dessart* v. *Leggett*, 16 N. Y. St. Rep. 582, affg. 5 Duer, 156.

A tender of a bond is sufficient if made upon trial before verdict. *Brookman* v. *Metcalf*, 4 Robt. 568.

Unless the lost note was negotiable, which is not to be presumed, a bond is not necessary. *Wright* v. *Wright*, 54 N. Y. 437, affg. 59 Barb. 505.

Nonjoinder.— A defendant not pleading or giving notice of the nonjoinder of a party cannot raise that objection on the trial. *Abbe* v. *Clark*, 31 Barb. 238; *Scrantom* v. *Farmers, etc., Bank of Rochester*, 24 N. Y. 424; *Pachin* v. *Peck*, 38 N. Y. 39.

Notary public's certificate evidence; affidavit against it.— Code Civ. Proc., § 923.

In case of death, or insanity, absence, or removal of a notary public, his original protest is proof of demand, also any note or memoranda, or his official register of acts. Code Civ. Proc., § 924.

For proof of presentment, etc., of foreign bill, see Code Civ. Proc., § 925.

Notice of motion to set aside verdict.— The statutory provision requiring a five days' notice of motion to set aside a verdict may be

waived. *O'Gorman* v. *Tects*, 20 Misc. Rep. 359. See "Grounds of motion to set aside verdict," etc., § 254.

Oath or affirmation.— As to *administration of an oath* or *affirmation and general mode of swearing*, see Code Civ. Proc., §§ 842 to 851.

Objections and exceptions.— Where the first of a series of similar questions is objected to and exception taken to overruling the objection, and a motion made to strike out the answer, and exception taken to its denial, the objection, motion, and exceptions need not be taken to each question and answer in succession, in order to have the exceptions available. *Wilson* v. *Nassau Electric R. R. Co.*, 56 App. Div. 570, 67 N. Y. Supp. 486.

An objection that the evidence offered is incompetent raises every ground of incompetency and is available on appeal as to every ground which could not have been obviated at the trial, including that it was not part of the *res gestæ*. *Taylor* v. *Central, etc., R. R. Co.*, 63 App. Div. 586, 71 N. Y. Supp. 884.

Official certificates, evidence.— Code Civ. Proc., § 921.

Order of arrest.— Where an order of arrest has been granted, and is not vacated, plaintiff need only prove his money demand, and he is then entitled to judgment subjecting defendant to execution against his person. *Stern* v. *Moss*, 67 How. Pr. 199; s. c., 12 Daly, 516; *Johnson* v. *Florence*, 32 How. Pr. 230.

Ordinances, etc., of cities, villages, etc., may be read in evidence.— Code Civ. Proc., § 941.

Party when he can and cannot be examined.— See Code Civ. Proc., § 829.

Physicians not to disclose professional information.— Code Civ. Proc., § 834. A person, duly authorized to practice physic or surgery, shall not be allowed to disclose any information which he acquired in attending a patient, in a professional capacity, and which was necessary to enable him to act in that capacity.

By section 836 of the Code of Civil Procedure, certain exceptions are made in this respect.

Plaintiff; failure to appear and dismissal of action.— See §§ 248 and 249.

Pleading; objections to.— There are but two objections that can be taken to a pleading on the trial; one that the court has no jurisdiction of the action, and the other, that the complaint does not state facts sufficient to constitute a cause of action. *Winterson* v. *Eighth Ave. R. R. Co.*, 2 Hilt. 389; *Luddington* v. *Taft*, 10 Barb. 447.

Either of these objections may be raised for the first time upon the trial, and will not be waived by an omission to demur. *Coffin* v. *Reynolds*, 37 N. Y. 640; § 499 of the Code Civ. Proc.; *De Bussiere* v. *Holladay*, 4 Abb. N. C. 111.

The practice of taking objections to a pleading on the trial is not favored by the courts. *Smith* v. *Countryman*, 30 N. Y. 655; *Mayor* v. *Ficgel*, 34 How. 434.

It has been held to be wholly within the discretion of the judge whether he will or will not allow the pleadings to be read to the jury during the progress of the trial. *Willis* v. *Forrest*, 2 Duer, 310.

Id.; facts proven.— The court will conform the pleading to the facts proven. This power is given by statute and is very broad and ample, the intention being not to restrict parties to the formalities of pleadings, but to try the case broadly upon the merits. *Binges* v. *Evans*, 1 E. D. Smith, 192.

Printed copies of laws of another State, and reports of cases may be read in evidence. Code Civ. Proc., § 942.

Public officer; when certificate of public officer is evidence.— Code Civ. Proc., § 922.

Request to go to jury.— Defendants' counsel having unsuccessfully moved for dismissal of the complaint, and for a direction of a verdict, excepted to the submission of each and every one of five questions submitted to the jury, but made no request for the submission of any other questions or that the case be submitted in any other form,— *Held*, that he was not in a position to raise the question on appeal that the findings amounted to a special verdict, and that all the issues were not, and should have been, submitted to the jury. *Genung* v. *Metropolitan Life Ins. Co.*, 60 App. Div. 424, 69 N. Y. Supp. 1041.

Right to begin; affirmative of issue; to open and close the case.— The right to begin is a matter of great importance in a jury trial, as the party who begins has the right to make the closing address to the jury. *Huntington* v. *Conkey*, 33 Barb. 218.

It is a general rule that the party upon whom the affirmative of the issue lies is entitled to begin. *Lindsey* v. *European Petroleum Co.*, 41 How. 56; *Hoxie* v. *Green*, 37 How. 97; *Elwell* v. *Chamberlain*, 31 N. Y. 611; *Clafflin* v. *Barre*, 28 Hun, 204.

Where a complaint is admitted, and nothing remains to be proven but the interest, the defendant has the affirmative of the issue. *Brennan* v. *Security Life Ins. Co.*, 4 Daly, 296; *Hunter* v. *American Popular Life Ins. Co.*, 4 Hun, 794; *Millerd* v. *Thorn*, 56 N. Y. 402.

In all cases where damages sought to be recovered in the action are unliquidated, the plaintiff has the right to begin. *Huntington* v. *Conkey*, 33 Barb. 218.

The denial of this right is ground for reversal on appeal, unless the court can clearly see that no injury or injustice resulted from the erroneous decision. *Hoxie* v. *Green*, 37 How. 97; *Fry* v. *Bennett*, 28 N. Y. 324; *Murray* v. *N. Y. Life Ins. Co.*, 85 N. Y. 236.

Id.; affirmative of issue.— A party holding the affirmative upon an issue of fact has the right to open and close the proof and reply.

If the plaintiff, without giving any evidence, is entitled to recover upon the pleadings, the affirmative of the issue rests with the defendant, and he is entitled to open and close the proof and to reply. *Heilbronn* v. *Herzog*, 165 N. Y. 98.

Where the complaint alleges a sale and delivery of goods, for the price of which the action is brought, and the answer merely alleges that the goods were sold upon a term of credit, which had not expired at the commencement of the action, the affirmative of the issue rests with the defendant and he is entitled to open and close the case. *Heilbronn* v. *Herzog*, 165 N. Y. 98, 58 N. E. 759.

Id.; opening case.— The object of opening the case is to state briefly the nature of the action, the substance of the pleadings, the points in issue, the facts and circumstances of the case, and the substance of the evidence to be adduced in its support. *Ayrault* v. *Chamberlain*, 33 Barb. 229.

The judge cannot dismiss the complaint on the ground that the counsel for plaintiff has failed to state a cause of action in his opening. *Sawyer* v. *Chambers*, 43 Barb. 622; s. c., 44 Barb. 42; *Stewart* v. *Hamilton*, 28 How. 265; s. c., 18 Abb. 298.

After the plaintiff has rested, the defendant may open his case to the jury by giving a statement of his answer to the plaintiff's case, and the evidence he proposes to give to sustain it. *Ayrault* v. *Chamberlain*, 33 Barb. 229.

Id.; reopening case.— After the parties have rested, but before the case has been finally submitted, while the parties and their witnesses are still present, the admission of additional evidence is entirely in the discretion of the justice. *Harpell* v. *Curtis*, 1 E. D. Smith, 78; *Pickert* v. *Dexter*, 12 Wend. 153; *Reed* v. *Barber*, 3 Code Rep. 160; *Lambert* v. *Seely*, 2 Hilt. 430; *Hyland* v. *Sherman*, 2 E. D. Smith, 235; *Williams* v. *Hays*, 20 N. Y. 58; *Anthony* v. *Smith*, 4 Bosw. 503; *Solomon* v. *Central Pk., etc., R. R. Co.*, 1 Sweeny, 298; *Henry* v. *Lowell*, 16 Barb. 268; *Meyer* v. *Goedel*, 31 How. 456.

Seal, presumptive evidence of consideration.— Code Civ. Proc., § 840. A seal upon an executory instrument hereafter executed is only presumptive evidence of a sufficient consideration, which may be rebutted, as if the instrument was not sealed.

Id.; public or corporate, may be stamped, but private seal not. Statutory Construction Law (Laws 1892, chap. 677), § 13.

Second trial.— Where a judgment has been reversed and a new trial ordered, the justice has power, on the second trial, to direct that the trial be had by jury. *New York Small Stock Co.* v. *Third Ave. R. R. Co.*, 16 Misc. Rep. 64.

Statute or resolution of the Legislature; how proved.— See Code Civ. Proc., § 932.

Sunday.— Trial in court on Sunday is illegal and void. *People ex rel. Donohue* v. *Walton*, 35 Misc. Rep. 320.

Transcript of proceedings, or papers filed in this court is evidence, by latter part of section 15 of this act. See also § 289.

Trial.— After the plaintiff has made a *prima facie* case and rested, the defendant states his case to the jury and calls his witnesses; and after he has rested, the plaintiff may introduce evidence in denial, or by way of avoidance of the defendant's evidence; and if the evidence of plaintiff in reply was in avoidance of defendant's evidence, the defendant may introduce new evidence rebutting that given in reply. *Ramertze* v. *East R. Bank*, 2 Sweeny, 82; s. c., 49 N. Y. 577; *Ayrault* v. *Chamberlain*, 33 Barb. 229.

The complaint may be amended on the trial so as to include matters proved upon the trial, where such amendment is in furtherance of justice. *Parsons* v. *Sutton*, 66 N. Y. 92.

The judge has power to adjourn the trial to enable defendant to procure witnesses to meet testimony of plaintiff which could not have been anticipated from the pleading, if, in his discretion, he thinks an adjournment should be had. *Jourdan* v. *Healy*, 46 N. Y. St. Rep. 198.

Waiver as to confidential and privileged communications of attorneys and counselors, clergymen, etc., and physicians and surgeons, how to be made. See § 836, Code Civ. Proc.

Witness; adverse.— Plaintiff, compelled to call defendant as a witness to prove his case, should be allowed a large latitude in conducting the examination. *Levin* v. *Spero*, 35 Misc. Rep. 792.

Id.; conviction of crime not to exclude witness.— See § 832, Code Civ. Proc.

Id.; credibility; impeaching.— A party having introduced a witness, asserts his credibility, and cannot impeach it by showing that he had previously sworn contrary to his present testimony. *Craft* v. *Brandow*, 61 App. Div. 247, 70 N. Y. Supp. 364.

Id.; impeaching.— And it is in the discretion of the court to interpose and protect a witness against any inquiries not relevant to the issue, and having no object in view but the impeachment of the witness. *Great Western Turnpike Co.* v. *Loomis*, 32 N. Y. 127; *Varona* v. *Socarras*, 8 Abb. 302.

In the impeachment of witnesses, it is the general character alone that is in question, and therefore specific acts of immorality on the part of a witness cannot be given in evidence to impair his credibility. *Corning* v. *Corning*, 6 N. Y. 97; *Greaton* v. *Smith*, 1 Daly, 380.

Id.; limiting number of.— The court may exercise a reasonable discretion as to the number of witnesses to be examined on one side, as to what occurred at a given time and place between the parties, and a decision in that respect is not the subject of an exception which can be

reviewed. *Anthony* v. *Smith*, 4 Bosw. 503; *Spear* v. *Meyers*, 6 Barb. 445; *People* v. *Cook*, 8 N. Y. 67, 77.

Id.; qualification of.— Code Civ. Proc., § 850. The court or officer may examine *an infant*, or a person *apparently of weak intellect*, produced before it or him as a witness, to ascertain his capacity and the extent of his knowledge; and may inquire of a person produced as a witness, what peculiar ceremonies in swearing he deems most obligatory.

Id.; recalling after case is closed is entirely discretionary. *Sheldon* v. *Wood*, 2 Bosw. 267; *Harpell* v. *Curtis*, 1 E. D. Smith, 78; *Treadwell* v. *Stebbins*, 6 Bosw. 538; *Lambert* v. *Seely*, 2 Hilt. 429; *Heidenheimer* v. *Wilson*, 31 Barb. 639.

Id.; transactions with deceased.— The maker of a note is disqualified to testify in his own behalf as to personal transactions and communications between himself and the deceased payee thereof under section 829 of the Code of Civil Procedure, as against one obtaining title to the note through such payee. *Wangner* v. *Grimm*, 169 N. Y. 421.

Id.; when not excused from testifying. — Code Civ. Proc., § 837. A competent witness shall not be excused from answering a relevant question on the ground only that the answer may tend to establish the fact that he owes a debt, or is otherwise subject to a civil suit. But this provision does not require a witness to give an answer which will tend to accuse himself of a crime or misdemeanor, to expose him to a penalty or forfeiture; nor does it vary any other rule, respecting the examination of a witness.

Writing.— The rule that parol evidence is not admissible to vary a writing does not apply to persons not parties to the writing. *Williams* v. *Fisher*, 28 N. Y. Supp. 739.

Id.; disputed.— Comparison of a disputed writing, with any writing proved to the satisfaction of the court to be genuine, shall be permitted to be made by witnesses in all trials and proceedings, and such writings and the evidence of witnesses respecting the same may be submitted to the court and jury as evidence of the genuineness, or otherwise, of the writing in dispute. Laws 1880, chap. 36, § 1, amended by Laws 1888, chap. 555, so as not to apply to any proceeding previously commenced.

As to meaning of the term "disputed writing," as used in the statute, see *People* v. *Molineux*, 168 N. Y. 264, where the history of this subject is collated.

§ 241. **Submission of a controversy upon facts admitted.**— When an action or summary proceeding has been commenced according to the provisions of this act, upon its being reached for trial, the parties, being of full age, may agree upon a statement of the facts upon which the controversy depends and may present a written submission thereof to the court. Such statement must be accompanied with the affidavit of

one or more of the parties to the effect that the controversy is real and that the submission is made in good faith, for the purpose of determining the rights of the parties.

Notes to section 241.

This section, together with sections 242 and 243, are taken from title II, article II, "Submission of a Controversy, upon Facts Admitted," sections 1279, 1280, and 1281 of the Code of Civil Procedure.

By section 243 it will be seen that "an order of arrest, warrant of attachment, a writ of replevin, or an execution against the person cannot be granted in such an action."

For decisions under the foregoing sections, see an annotated Code of Civil Procedure.

§ 242. **Papers to be filed.**— Such statement, submission and affidavit must be filed in the office of the clerk of the court in the district in which the action was commenced. The filing is a presentation of the submission, and each provision of this act relating to an action or summary proceeding, or the costs therein, applies to the subsequent proceedings except as otherwise prescribed in the next section.

Note to section 242.

See notes to section 241.

§ 243. **Subsequent proceedings regulated.**— An order of arrest, warrant of attachment, writ of replevin or execution against the person, cannot be granted in such an action. The action must be tried by the court upon the statement alone and the statement, submission, affidavit and the judgment rendered, and any order or papers necessarily affecting the judgment constitute the judgment record. If the statement of facts is not sufficient to enable the court to render judgment, an order must be made dismissing the submission without costs to either party, unless the court permit the parties, or, in a proper case, their representative, to file an additional statement, which it may do in its discretion, without prejudice to the original statement.

Note to section 243.

See note to § 242.

NOTE.— There are no sections from 243 to 248.

TITLE VII.

Judgment and Execution.

ARTICLE I. Judgments.
II. Executions.

ARTICLE I.

Judgments.

SECTION 248. Nonsuit; when authorized.
249. Judgment of dismissal on merits; when.
250. Judgment when sum exceeds jurisdiction.
251. Judgment where defendant liable to arrest.
252. Court may direct verdict; when.
253. Court may open default.
254. Motion to set aside verdict or vacate or amend judgment.
255. New trial; fraud or newly-discovered evidence.
256. Court may impose conditions, et cetera.

Notes to title VII, article I.

There are ten sections in this title under article I, "Judgments," from sections 248 to 257 both inclusive. While the above "Contents" only has nine, from sections 248 to 256, thus omitting to mention section 257 in the contents, which is a provision for an appeal from an order as provided in sections 253 to 256, inclusive.

In addition to the "Judgments" specified in this article, this act contains the following provisions about "Judgments."

Judgment; chattel; requisite of, in action to foreclose lien on a.— See § 141.

Id.; counterclaim when equal or unequal.— See §§ 153 and 154.

Id.; default.— See § 147, and notes.

Id.; Docketed, becomes a judgment of Supreme Court. See § 261, and notes.

Id.; Id.— Binds real property for ten years. See § 263, and notes.

Id.; Id.— In another county. See § 269.

Id.; Id.— Effect of, against defendants jointly indebted when all are not served. See § 267.

Id.; executor or administrator.— See § 156.

Id.; fictitious name.— Judgment against defendant by a, may be amended. Lien of. See § 1251, Code Civ. Proc., as amended by Laws 1902, chap. 318, and § 27 of this act, and notes.

Id.; issues joined after trial.— See § 230, and notes.

Id.; joint debtors.— Effect of, against defendants jointly indebted when all are not served. See § 264, and notes.

Id.; marshal.— Against. See § 270.

Mechanic's lien.— See § 1, subd. 10.

Id.; offer to allow, or compromise.— See § 148, and notes.

Id.; plaintiff to prove his case, except on contract where there is a verified complaint. See § 147, and notes.

Id.; replevin.— Final judgment in.— See § 123, and notes.

Id.; return of execution and satisfaction.— See § 277.

Id.; satisfaction of; when presumed.— See § 262, and notes.

Id.; wage-earners.— In favor of. See § 274.

Attorney; when judgment void.— Where a person not regularly admitted to practice in the courts of record of the State of New York, and not a party to an action, conducts it in this court, the judgment rendered therein is void as violative of the Code of Civil Procedure, sections 63, 64. *Kaplan* v. *Berman*, 37 Misc. Rep. 502.

Entry of, is the final step in the action, and completes it. *People* v. *Judge*, 13 How. Pr. 398; *People* v. *Colborne*, 20 How. Pr. 380; *Wetmore* v. *Holseman*, 14 Abb. Pr. 311; *Willey* v. *Shaver*, 1 Sup. Ct. (T. & C.) 327.

Interest on judgment is allowed from the time it is entered. See Code Civ. Proc., § 1211.

Married woman.— Judgment for, or against, may be entered as if she were single. See § 1206, Code Civ. Proc.

Motion costs to be included in the judgment, or offset against it. *Faber* v. *Flauman*, 30 Misc. Rep. 627, 62 N. Y. Supp. 784.

Voluntary nonsuit.— The plaintiff may elect to be nonsuited on his own election, if he fails in his proof by reason of incompetency or insufficiency of evidence. *Peters* v. *Diossy*, 3 E. D. Smith, 116.

The plaintiff must elect to be nonsuited, at the trial, before the coming in of the verdict. If the cause is submitted to the justice, and he reserves his decision, the cause is then *sub judice* on the merits, and the plaintiff has no longer the right to submit to be nonsuited, nor the justice power to grant it. *Peters* v. *Diossy*, 3 E. D. Smith, 116; *Elwell* v. *McQueen*, 10 Wend. 521; *Hess* v. *Beekman*, 11 Johns. 457; *Bennell* v. *Hull*, 10 Johns. 364; *Clements* v. *Benjamin*, 12 Johns. 299; *Hess* v. *Beekman*, *supra*.

A nonsuit ordered after the cause has been finally submitted by the plaintiff, on a trial on the merits, even if ordered with the plaintiff's consent, must be regarded as a judgment for the defendant, and is a bar in any other litigation between the parties. *Gillian* v. *Spratt*, 8 Abb. Pr. N. S. 13; s. c., 3 Daly, 440.

§ 248. **Nonsuit; when authorized.**— Judgment that the action be dismissed with costs, without prejudice to a new action, shall be rendered in the following cases:

Note to section 248.

This section is taken from section 1382 of the Consolidation Act (Laws 1882, chap. 410), which was Laws 1857, chap. 344, § 45.

1. Where the plaintiff voluntarily discontinues the action before it is finally submitted.

2. When he fails to appear at the time specified in the summons or upon adjournment.

Notes to section 248, subdivision 2.

Dismissal of complaint; unverified answer.— Failure of defendant to serve a verified answer does not preclude him from moving to dismiss the complaint as not stating a cause of action, and such motion is to be treated as a demurrer. *Morris* v. *Hunken*, 40 App. Div. 129, 57 N. Y. Supp. 712.

Failure to appear on adjourned day, and dismissal of the action therefor, causes loss of jurisdiction of defendant, and plaintiff cannot thereafter restore the case and take an inquest. *Abrams* v. *Fine*, 28 Misc. Rep. 533, 59 N. Y. Supp. 550.

Id.; counterclaim.— Defendant had set up a counterclaim, and had commenced his proof, and the cause was adjourned by consent; on the adjournment day the plaintiff failed to appear; the justice proceeded with the trial, and rendered judgment for the defendant for amount of his counterclaim. *Held*, that the justice erred, and that he ought merely to have dismissed the action. *Norris* v. *Bleakley*, 3 Abb. Pr. 107; s. c., 1 Hilt. 90.

3. When it is objected at the trial, and appears by the evidence that the court has not jurisdiction, but if the objection be taken and overruled, it is cause only of reversal on appeal, and does not otherwise invalidate the judgment; if not taken at the trial it is waived, and the court will be deemed to have jurisdiction.

4. Where the plaintiff does not prove his cause of action.

Notes to section 248, subdivision 4.

What to be deemed a failure of proof.— See § 173.

Contract; damages; wages.— The complaint in an action for a wrongful discharge from employment, having stated every fact essential to a cause of action for damages for breach of the contract, should not be dismissed because the demand is in the form of an amount due for wages. *Williams* v. *Conners*, 53 App. Div. 599, 66 N. Y. Supp. 11. See also *Lester* v. *Seilliere*, 50 App. Div. 239, 63 N. Y. Supp. 748.

Cause of action for arrest and contract.— Though the complaint by an unskilled laborer, under a statute authorizing an execution against the person, fails to state a cause of action to bring the case within the statute, but sets out a sufficient cause of action for services, plaintiff

should not be nonsuited. *Wahkee* v. *Young*, 29 Misc. Rep. 658, 61 N. Y. Supp. 894. See also *Russell* v. *Corning Mfg. Co.*, 49 App. Div. 610, 63 N. Y. Supp. 640.

Replevin.— Failure to make out a case in replevin where defendant does not claim title to himself does not entitle him to a judgment of possession of the property and damages, but only to a dismissal of the complaint. *Nichols* v. *Potts*, 35 Misc. Rep. 273.

Set-off.—Where the complaint was for damages to plaintiff's property, and the defendant answered by simply averring a set-off,—*Held* error to order a nonsuit, no evidence having been offered by either party. The defendant admitted plaintiff's claim, and not offering any evidence, judgment should have been rendered for the plaintiff. *Gregory* v. *Trainor*, 4 E. D. Smith, 58.

Sunday.—A judgment cannot be entered on Sunday (*Hoghtaling* v. *Osborn*, 15 Johns. 119), and if entered is void. *Hastings* v. *Farmer*, 4 N. Y. 293.

Tort and contract.— A complaint stating a cause of action upon contract is not necessarily made for conversion by alleging that defendant wrongfully converted a balance of account upon the sale of goods consigned to him for sale upon commission, and in such case the complaint should not be dismissed at the close of plaintiff's case, if he has made out a cause of action for the proceeds received for sales. *Fyfe* v. *Jackson*, 55 App. Div. 74, 66 N. Y. Supp. 972. See also *Carter* v. *Eighth Ward Bank*, 33 Misc. Rep. 128, 67 N. Y. Supp. 300.

Where, in an action for *tort*, in wrongfully taking and converting plaintiff's property, there is an entire failure to show that it was wrongful or tortious, or that there was any fraudulent intent, there should be a nonsuit. 16 N. Y. 250, 21 How. Pr. 289, 5 Duer, 389; *Ranson* v. *Wetmore*, 39 Barb. 104; *Hawkes* v. *Burke*, 34 Misc. Rep. 189.

§ 249. **Judgment of dismissal on merits; when.**— Judgment that the action be dismissed on the merits with costs may be rendered in the following cases:

1. Where, at the close of the whole case, the court is of the opinion that the plaintiff is not entitled to recover as a matter of law.

2. Where the court sustains a demurrer, and no leave to plead over is granted, as provided in this act.

Notes to section 249.

This section is new.

Dismissal and merits.— Dismissal of an action on the merits for failure of proof is error calling for a reversal, dismissal without preju-

dice, with costs, being all that is within the power of the justice to order. *Merkin* v. *Gersh*, 30 Misc. Rep. 758, 63 N. Y. Supp. 75.

Dismissal of the complaint at the close of plaintiff's case does not justify judgment for defendant on the merits. *Lampert* v. *Ravid*, 33 Misc. Rep. 115, 67 N. Y. Supp. 82.

A judgment of nonsuit, or its equivalent — a dismissal of the complaint not upon its merits in this court — is error, if there was sufficient evidence to require a decision on the merits. *Schlesinger* v. *Jud*, 61 App. Div. 453, 70 N. Y. Supp. 616.

The judgment should simply provide that the action is dismissed, with costs, without prejudice to a new action. *Kieffer* v. *Metropolitan Street Ry. Co.*, 31 Misc. Rep. 780, 65 N. Y. Supp. 228.

§ 250. **Judgment when sum exceeds jurisdiction.**— Where the amount found due to either party exceeds the sum for which the court is authorized to enter judgment, such party may remit the excess and judgment may be entered for the residue.

Note to section 250.

This section is the same as section 1385 of the Consolidation Act (Laws 1882, chap. 410), which is the same as section 49, chapter 344, Laws 1857, from which latter section, section 3176 of the Code of Civil Procedure is taken.

§ 251. **Judgment where defendant liable to arrest.**— When a judgment is rendered in a case where the defendant is subject to arrest and imprisonment thereon, it must be so stated in the judgment and entered in the docket. The clerk of the court in the district in which such judgment is entered, must in any transcript issued by him, as prescribed in this act, insert the words "defendant liable to execution against his person" and a like note must also be made in the docket of a judgment by a county clerk, where such a transcript is filed with such clerk.

Notes to section 251.

This section is the same as section 1386 of the Consolidation Act (Laws 1882, chap. 410), which is the same as Laws 1857, chapter 344, section 50, down to the words "and entered in the docket." The balance is taken from section 1393 of the said Consolidation Act.

Adjudication.— The judgment appealed from containing nothing to show that defendant was subject to arrest and imprisonment.—*Held*,

that without such adjudication he could not be arrested and imprisoned. *Banton* v. *Torrey*, 29 Misc. Rep. 742.

Conversion.— Upon recovery by plaintiff in an action for conversion of personal property, he is entitled to have inserted in the judgment a provision for execution against the person of defendant. *Searing* v. *Goodstein*, 11 Daly, 236; s. c., 11 Abb. N. C. 450; s. c., 2 Civ. Proc. Rep. 464; *Babcock* v. *Smith*, 47 N. Y. St. Rep. 118.

Id.; boarding-house-keeper's lien.—An action to enforce a boarding-house-keeper's lien upon property of a boarder which he has clandestinely removed is one for conversion of personal property, and the justice is bound to insert in the judgment the liability of the defendant to arrest upon execution. *Babcock* v. *Smith*, 47 N. Y. St. Rep. 118, 19 N. Y. Supp. 817.

Damages and costs.— Judgment for plaintiff suing for conversion should be for the damages and such disbursements and fees as the statute allows and such costs as the trial justice in his discretion deems proper within the statutory limit. *Wilson* v. *Vallin*, 32 Misc. Rep. 739.

Docket; entry in, afterward.—A judgment is sufficiently rendered when an entry is made by the justice in his minutes, or a memoranda of it is made on the papers or copies thereof, if made in five days, although no entry is made in the docket until afterward. *Risk* v. *Uffelman*, 7 Misc. Rep. 133.

Id.; altering.— The alteration of the docket, after judgment, does not affect the validity of the judgment. *Dauchy* v. *Brown*, 41 Barb. 555.

Id.; omission to keep.— The omission by a justice to keep his docket in the manner which the law prescribes does not render a judgment void, as the proceedings before him can still be proved by himself. *Baker* v. *Brintnall*, 52 Barb. 188; s. c., 5 Abb. Pr. N. S. 253.

Duty of judge.— It is the duty of the justice to pass upon the question of the defendant's liability to an arrest, as definitely as upon that of his liability in the action, and to embody his conclusion in his judgment.

The judgment must state that the cause is one in which the defendant is subject to arrest and imprisonment. *Carpentier* v. *Willett*, 18 How. Pr. 400; s. c., 6 Bosw. 25, 31 N. Y. 90, 1 Keyes, 510, 28 How. Pr. 225. This is a part of his judicial labor and duty. After judgment the justice has no jurisdiction; he is *functus officio*. *Carpentier* v. *Willett*, 31 N. Y. 90; s. c., 28 How. Pr. 225, 1 Keyes, 510; *People, etc.* v. *Callahan*, 7 Daly, 434.

It is the duty of the justice to state in the judgment where an arrest was granted, that it was rendered in a case where the defendant was subject to arrest and imprisonment, and so enter it in his docket: and for his failure to do so, the judgment will, on appeal, be reversed. *Coles* v. *Hannigan*, 8 Daly, 43. See also *Searing* v. *Goodstein*, 11 Daly, 236; s. c., 11 Abb. N. C. 450, 2 Civ. Proc. Rep. 464.

Indorsement on summons.— By section 39, it is required that where execution against the person may issue and no verified complaint is served, the summons must be indorsed in the following form: "Plaintiff claims defendant is liable to arrest and imprisonment in this case."

Effect of; judgment.— The insertion in a judgment after denial of a motion to vacate an order of arrest obtained in the action, that defendant is liable to arrest and imprisonment, is not conclusive upon application for the discharge of the imprisoned debtor as to whether the debtor's proceedings are just and fair. *Matter of Zeitz*, 12 Civ. Proc. Rep. 423.

Goods sold; arrest for fraud; proof on trial.— In an action for goods sold and delivered upon affidavits that the goods were obtained by false and fraudulent representations, an order of arrest was obtained and defendant was arrested. A motion to vacate the order of arrest was denied. *Held*, that upon the trial, proof by plaintiff of the sale and delivery of the goods and nonpayment therefor, without proof of the fraud averred in the affidavits, was sufficient to entitle him to recover, and to have execution against the person of defendant. *Stern* v. *Moss*, 12 Daly, 516.

Nature of the action.— The right to a judgment making defendant liable to execution against his person depends upon the nature of the action and not upon the manner of commencing it. *Searing* v. *Goodstein*, 64 How. 427.

Professional misconduct.— The action being brought in this court to recover the sum of $20, deposited by plaintiff with defendant as security for dental work, which the latter agreed to perform and neglected and refused to do, and refused to return the money on demand, an inquest was taken and all the allegations proved except the fact that defendant was licensed and authorized to practice his profession, —*Held*, that the justice was obliged to insert the words, "defendant liable to arrest and imprisonment on execution," in the judgment, under Code Civ. Proc., § 2895, subd. 2, as for "misconduct or neglect in a professional employment, fraud, or deceit," the section being made applicable to justice's court by section 3018. *Haight* v. *Martin*, 62 App. Div. 409, 70 N. Y. Supp. 758.

§ 252. **Court may direct verdict; when.**— On the trial of an issue of fact, before the court and a jury, the court may, in a proper case, direct that the jury render a verdict as follows:

1. In favor of the plaintiff or petitioner.

2. In favor of the defendant, respondent, tenant, undertenant, assignee, receiver, squatter or person holding over.

3. Where the damages are liquidated, in favor of the plaintiff, for a specified sum.

4. Where the defendant has interposed a counterclaim, and the damages are liquidated, in favor of the defendant for a specified sum.

5. Where the plaintiff has proved his case, but the damages are uncertain, that the jury render a verdict in favor of the plaintiff and determine the amount.

6. Where the defendant has interposed a counterclaim and proved his case, and the damages are uncertain, that the jury find a verdict in favor of the defendant and determine the amount.

Notes to section 252.

This section is new and gives this court power similar to that possessed by a judge of a court of record, under section 1187 of the Code of Civil Procedure.

For decisions under this section, see the Annotated Codes of Civil Procedure, § 1187.

Defects cured by verdict, etc., and by judgment.— See § 721, Code Civ. Proc.

Jurisdiction.— Under section 1, subdivision 19, this court is given power to direct a verdict, etc.

§ 253. **Court may open default.**— The court, in a district in which a default is taken, in an action or summary proceeding, may at any time, upon motion made upon such notice as the court may direct, open such default, and set aside, vacate or modify any judgment or final order entered thereon, and set the action or proceeding down for pleading, hearing or trial, as the case may require, upon such terms and conditions as the court may deem proper.

Notes to section 253.

This section is taken from the first part of section 1367 of the Consolidation Act (Laws 1882, chap. 410), which was Laws 1862, chapter 484, section 16. The "*court*" may *at any time* open the default, upon such notice as it may direct, in either an action or "summary proceeding." This was not formerly so in summary proceedings. See *Cochran* v. *Reich*, 20 Misc. Rep. 593, and *Boyd* v. *Milone*, 24 Misc. Rep. 734.

This section vests this court with greater power than that possessed by a court of record, in that it can "open such default and set aside, vacate, or modify any judgment or final order entered thereon, *at any time*," while a court of record can only do this "at any time *within one year* after notice thereof." See § 724, Code Civ. Proc. This annuls the decision in *Feist* v. *The Third Ave. R. R. Co.*, 13 Misc. Rep. 240, where it was held, "The justice of a District Court has no power to open a default after the lapse of twenty days from the entry of the judgment. Section 724 of the Code of Civil Procedure, declaring the power of the courts to open defaults within one year, applies only to courts of record."

Adjournment.—After return day the court has no power in the *interim* to render judgment as upon defendant's default in answering. *Whitman, etc.* v. *Hamilton*, 27 Misc. Rep. 198, 57 N. Y. Supp. 760.

Affidavit of merits by the defendant is necessary upon a motion to open a default, and this must be drawn according to *Rule 23 of the Supreme Court*, which is as follows:

"Whenever it shall be necessary, in any affidavit, to swear to the advice of counsel, the party shall, in addition to what has usually been inserted, swear that he has fully and fairly stated the case to his counsel, and shall give the name and place of residence of such counsel. When an affidavit of merits has once been filed and served, no other shall be necessary. But on making a motion, such service and filing must be shown by affidavit."

The affidavit must pursue language of rule. *Bank of Utica* v. *Root*, 4 Hill, 535.

An affidavit of merits is required, or service and filing thereof must be shown by affidavit. *Thornall* v. *Turner*, 23 Misc. Rep. 363, 51 N. Y. Supp. 214. See also *Davis* v. *Solomon*, 25 Misc. Rep. 695.

An affidavit on which a default on the part of defendant and judgment for plaintiff were opened, which does not state that an affidavit of merits was made or filed, and that manifest injustice has been done to defendant is fatally defective. *Cahill* v. *Lilienthal*, 30 Misc. Rep. 429, 62 N. Y. Supp. 524.

An order of this court opening a defendant's default will be reversed, if no affidavit of merits has been made or served and no defense proved. *Sandowitz* v. *Duane*, 30 Misc. Rep. 630, 62 N. Y. Supp. 744.

For cases applicable to the sufficiency of an affidavit of merits see cases under this rule in Cumming & Gilbert's Official Court Rules, p. 90.

Appeal from order opening default.—By section 257, "no appeal lies *in the first instance* from an order *opening* a default and vacating a judgment entered thereon."

The remedy is by appeal from the judgment. *Beebe* v. *Nassau Show Case Co.*, 41 App. Div. 456, 56 N. Y. Supp. 769. See notes to §§ 257 and 310.

Default; what is a.— Where a defendant is personally absent, and his counsel makes an application for a postponement, which is denied, and defendant's counsel remains during the inquest and cross-examines plaintiff's witnesses merely, such cross-examination does not change the inquest or default into a trial. It is a default within the meaning of the statute giving District Court judges power to open defaults. *People* v. *Langbein*, 12 Week. Dig. 20, 11 Rep. 746.

Id.; discretionary.— Opening defaults are discretionary, and therefore are not reviewable on appeal, except perhaps they exhibit an abuse of discretion. *Keller* v. *Feldman*, 49 N. Y. St. Rep. 718; s. c., 29 Abb. N. C. 426. See also *Tooker* v. *Booth*, 7 Misc. Rep. 421; *Harry* v. *Coffin*, 11 Daly, 180.

Id.; summons not personally served, and defendant not appearing, is not a default, for the defendant was not served. The remedy is not by motion to open the default but by appeal from the judgment as is provided by section 311, which see *and notes*.

Denial of motion with leave to renew; judgment entered by default. The remedy is to open the default, and not an appeal from the judgment. *Edelson* v. *Epstein*, 27 Misc. Rep. 543, 58 N. Y. Supp. 334.

Dishonest, immoral, and unconscionable defenses.— Where the defenses which the defendant seeks to interpose are dishonest, immoral, and unconscionable, the default and judgment should not be opened. The defense should be to the merits. *Lovett* v. *Cowman*, 6 Hill, 225; *Beach* v. *Fulton Bank*, 3 Wend. 585, 10 Paige, 374, 3 Wend. 561; *King* v. *Merchants' Ex. Co.*, 2 Sandf. 603, 697; *Jackson* v. *Varish*, 2 Wend. 294.

Id.; usury, and the statute of limitations are unconscionable defenses, which the court will not allow a defendant to plead in opening a default regularly taken. *Wagner* v. *Sickle*, 3 Paige, 407; *National Fire Ins. Co.* v. *Sackett*, 11 Paige, 669; *Quincy* v. *Foot*, 1 Barb. Ch. 496; *Watt* v. *Watt*, 2 Barb. Ch. 371; *Jackson* v. *Varish*, 2 Wend. 294; *Lovett* v. *Cowman*, 6 Hill, 225; *Jackson* v. *Murray*, 1 Cow. 158; *Utica Ins. Co.* v. *Scott*, 6 Cow. 606; *Hallayen* v. *Golden*, 1 Wend. 302. See also *Fulton Bank* v. *Beach*, 1 Paige, 429, 3 Wend. 573, 585; *Utica Ins. Co.* v. *Scott*, 6 Cow. 606; *Law* v. *Merrills*, 6 Wend. 268, 277, 279; *Hawes* v. *Hoyt*, 11 How. Pr. 454; *Morris* v. *Slattery*, 6 Abb. Pr. 74; *Farish* v. *Corlies*, 1 Daly, 274; *Toole* v. *Cook*, 16 How. Pr. 454; *Sagory* v. *N. Y. & N. H. R. R. Co.*, 21 How. Pr. 455; *McQueen* v. *Babcock*, 22 How. Pr. 229; s. c., 13 How. Pr. 268. Leave was refused to add a plea of the statute of limitation. *Cox* v. *Robt*, 2 Wils. 253; *Coit* v. *Skinner*, 7 Cow. 401; *Wollcott* v. *McFarlan*, 6 Hill, 227.

Id.; insolvent discharge cannot be allowed upon opening a default. *Desobry* v. *Morange*, 18 Johns. 336; *Price* v. *Peters*, 15 Abb. Pr. 197.

Id.; technical objections.— A default will not be opened to enable a party to raise technical objections. *Champlin* v. *Mayor*, 3 Paige, 573; *Gary* v. *Gay*, 10 Paige, 369; *Winship* v. *Jewett*, 1 Barb. Ch. 173.

Id.; penalty or forfeiture.— The defendant will not be allowed any grounds of defense which are in the nature of a penalty or forfeiture. *Wagner* v. *Sickle*, 3 Paige, 407.

Good faith; doubtful defenses.— If the good faith of the defense is doubtful, the default will not be opened. *Onderdonk* v. *Rawlett*, 3 Hill, 323; *Irroy* v. *Nathan*, 4 E. D. Smith, 58; *Peace* v. *Gleason*, 8 Johns. 409; *Rawson* v. *Crow*, 4 E. D. Smith, 18.

Excuse for opening default.— A satisfactory excuse must be shown, and also that manifest injustice has been done. A mere affidavit of merits is not sufficient. *Jewel* v. *Heinzel*, 6 Daly, 411; *Fowler* v. *Colyer*, 2 E. D. Smith, 125; *Armstrong* v. *Craig*, 18 Barb. 387.

It is not sufficient to state mere conclusions from facts, but the facts themselves must be stated in such a manner that the court will be authorized to infer from such facts that injustice has been done. Same cases above mentioned; *Haughley* v. *Wilson*, 1 Hilt. 259; *Sheldon* v. *Campbell*, 5 Hill, 508.

The manner in which the injustice has been done should be pointed out in the affidavit. *Mayer* v. *Greene*, 1 Hilt. 396.

The neglect must be the result of an honest accident or mistake. *Macumber* v. *Mayor*, 17 Abb. Pr. 35.

A party who seeks to prove that injustice has been done to him should offer proof other than his own affidavit, especially if contradicted by plaintiff's affidavits. If he cannot obtain the affidavit of another witness, he should at least show that there are witnesses who refuse to give their affidavit, and which, if produced, would reduce or disprove plaintiff's claim. *Lent* v. *Jones*, 4 E. D. Smith, 52; *Silkman* v. *Bolger*, 4 E. D. Smith, 236; *Foster* v. *Capewell*, 1 Hilt. 47.

Id.; sufficient excuses.— Where the defendant was under the necessity of leaving town, that he had prepared his defense, and had given the matter in charge of a person who was to see his attorney and inform him to attend on the return day of the summons; that the person *forgot* the message, it was *held* to be a sufficient excuse. *Camp* v. *Stewart*, 2 E. D. Smith, 88.

Where the defendant delivered the summons to his attorney, but such attorney was under the necessity of leaving the city, and who therefore placed the summons into the hands of another attorney, who promised to appear; that the latter had the summons locked up, and had lost the key and went to the wrong court, and in consequence thereof a judgment was taken, this was considered a sufficient excuse. *Lent* v. *Jones*, 4 E. D. Smith, 52.

Where it appears that a defendant really intends to appear and defend an action, and that he has a good defense, and that he failed to appear in consequence of *any excusable mistake*, the court will relieve him upon proper terms. *Seymour* v. *Elmer*, 4 E. D. Smith, 199; s. c., 1 Abb. Pr. 412; *Bissell* v. *Dean*, 3 E. D. Smith, 172; *Gottsberger* v.

Harned, 2 E. D. Smith, 128; *Gardner* v. *Wight*, 3 E. D. Smith, 334. Where the acts of the plaintiff are the cause of defendant's not appearing, and a default is taken, this will be a good excuse. *Beach* v. *McCann*, 1 Hilt. 256; s. c., 4 Abb. Pr. 18; *Beebe* v. *Roberts*, 3 E. D. Smith, 194.

The manner of serving the summons may be such as to excuse the defendant from appearing in the action, and to entitle him to relief against a judgment entered by default upon such service. 2 Wait's Law and Practice, 68; *Carroll* v. *Goslin*, 2 E. D. Smith, 376.

Where the plaintiff obtains judgment by default upon a false statement that the defendant does not intend to appear and defend, the default will be opened. *Beach* v. *McCann*, 1 Hilt. 256.

Where the summons stated that the defendant was required "to answer the complaint of the plaintiff for professional services," and it appeared that the defendant believed, from the wording of the summons and the facts within his knowledge, that the action was for a claim which he admitted to be due, and for that reason he failed to appear, whereupon the plaintiff recovered judgment for a greater, and for an entirely different claim,— *Held* sufficient as an excuse. *Bissel* v. *Dean*, 3 E. D. Smith, 172. See also *Lent* v. *Jones*, 4 E. D. Smith, 52.

Id.; insufficient excuses.— Engagements of defendant and of his attorney elsewhere, without stating the nature of those engagements, are not a sufficient excuse. *Mulhern* v. *Hyde*, 3 E. D. Smith, 177.

Attending to other business is not necessarily a good excuse for opening a default. *Fowler* v. *Collyer*, 2 E. D. Smith, 125.

When merits are not *disclosed and clearly* apparent, the mere absence of counsel will not be held a sufficient excuse. 6 Abb. Pr. 74; *Ward* v. *Ruckman*, 22 How. Pr. 230.

Or the misconduct or negligence of the attorney. 4 Abb. Pr. 11.

Putting the summons in a pocket and forgetting it till the time of its return had passed is not an excuse for a default. *Ball* v. *Mander*, 19 How. Pr. 468.

Neither is ignorance of law proceedings (*Mayor, etc., of New York* v. *Green*, 1 Hilt. 393), or forgetting the matter until after judgment is rendered (*Ball* v. *Mander*, 19 How. Pr. 468; *Beebe* v. *Roberts*, 3 E. D. Smith, 194; *Mix* v. *Warte*, 1 E. D. Smith, 614), or not hearing the cause called, although present in court. *Forster* v. *Capewell*, 1 Hilt. 47. Relying upon the promise of another, that the case would be adjourned, is not a sufficient excuse, unless it is shown the party intended to deceive. *Travis* v. *Bassett*, 3 E. D. Smith, 171.

Laches.— A motion to open a default with leave to come in and defend, made six years after entry of judgment, and after supplementary proceedings to reach property in the hands of a third party have been commenced, where no satisfactory explanation for the delay is given, should be denied. *Tooker et al.* v. *Booth*, 7 Misc. Rep. 421.

Not matter of right.— If the judgment was regularly obtained, the defendant is not entitled, as a matter of right, to have it opened. The granting of the motion rests in the discretion of the court. *Farish* v. *Corlies*, 1 Daly, 227. It is a matter of grace and favor, and if either granted or refused, is final and not appealable. *Bard* v. *Ford*, 1 N. Y. 43.

Defaults and judgments are only opened in furtherance of strict moral justice. *Hawes* v. *Hoyt*, 11 How. Pr. 454; *Leighton* v. *Wood*, 17 Abb. Pr. 177.

Poor person.— Leave to sue as a poor person does not deprive the court of power to impose costs against such person as a condition upon which a judgment by default will be opened. *Newgroske* v. *Manhattan R. R. Co.*, 1 N. Y. St. Rep. 302; *Elwin* v. *Routh*, 1 Civ. Proc. Rep. 131.

Order vacating order opening default for noncompliance with conditions.— See *Schwartz* v. *Schendel*, 23 Misc. Rep. 476, 51 N. Y. Supp. 415.

Reversal of order setting aside defendant's default.—All proceedings taken thereunder fall with it, and judgment for defendant rendered, pending the appeal from the order, must be reversed. *Weinberg* v. *Frank*, 25 Misc. Rep. 788, 56 N. Y. Supp. 920.

Statute.— The statute is remedial, and should be liberally construed for the purpose of advancing the remedy to be obtained. 4 Wait's Pr. 470; *People* v. *Campbell*, 18 Abb. Pr. 1.

Writ of prohibition will not lie to prevent the exercise of the judge's discretion upon an application to open the default. *People* v. *Langbein*, 12 Week. Dig. 20; s. c., 11 Rep. 746.

Summons not personally served, and defendant not appearing, he is allowed to appeal within twenty days after personal service upon him of written notice of entry of judgment. See § 311 and notes. The remedy is not by motion to open the default, for there is no default, as the defendant was not served.

Sunday.— An order returnable on Sunday is a nullity. *Arctic Fire Ins. Co.* v. *Hicks*, 7 Abb. Pr. 204.

§ 254. **Motion to set aside verdict or vacate or amend judgment.**— A motion to set aside the verdict of a jury, and vacate, amend or modify a judgment rendered thereon, or to vacate, amend or modify any judgment rendered upon a trial, by the court, without a jury, may be made upon the exceptions taken at the trial, or because the verdict is for excessive or insufficient damages, or otherwise contrary to the evidence, or contrary to law, provided said motion is made at the close of the trial or within five days from the time the judgment was rendered and in the latter case at

least two days notice of said motion is given, to the opposing attorney, or party if there be no attorney of record. The judge who presided at the trial may make an order setting aside the verdict or amending, modifying or vacating the judgment and awarding a new trial, and setting the cause down for trial for a time to be specified in the order, as the case may require.

Notes to section 254.

This section is taken from section 1367 of the Consolidation Act (Laws 1882, chap. 410), which was Laws 1862, chap. 484, § 16, and is somewhat similar to section 999 of the Code of Civil Procedure.

Section 1, subdivision 19, "Jurisdiction," gives power to this court to direct a verdict, etc.

By section 1, subdivision 15, this court has power to grant a stay of proceedings not to exceed five days.

Application is one of right.— Entry of judgment by the justice before deciding the motion works no injustice, as the application is one of right. *Cunningham* v. *Nassau Elec. R. R. Co.*, 40 App. Div. 211, 58 N. Y. Supp. 22.

Bias, prejudice, or passion.—A verdict should not be set aside except where the court can fairly say that the jury were led away from a proper consideration of the evidence by bias, prejudice, or passion, or that they failed to give some of the proof the weight which it obviously deserved. *Forst* v. *Farmer*, 21 Misc. Rep. 64.

Damages; excessive.— Where the only damages shown to have resulted from an eviction were $14 for removing goods, and an excess of rent of $15 a month for five months, which the party was compelled to pay for other premises, a verdict for $150 is clearly excessive. *O'Gorman* v. *Teets*, 20 Misc. Rep. 359; *Eschlbach* v. *Hughes*, 7 Misc. Rep. 172.

Id.; improper elements of.— A verdict will not be set aside, because of improper elements of damage, evidence as to which was not objected to at the time. *Murphy* v. *Street R. R. Co.*, 19 Misc. Rep. 194.

New trial in furtherance of justice.— On appeal, new trial ordered under *Curley* v. *Tomlinson*, 5 Daly, 283, on the ground that the ends of justice required it. *Jourdan* v. *Healy*, 46 N. Y. St. Rep. 198; s. c., 22 Civ. Proc. Rep. 157, 19 N. Y. Supp. 240. See also *McLaughlin* v. *Harriott*, 14 Misc. Rep. 343, and cases cited.

Notice of motion; irregularity; setting aside verdict.— Defendant's moving to set aside the verdict immediately after it is brought in, instead of giving the five days' notice prescribed by statute, is merely an irregularity, waived by plaintiff's proceedings to the argument without objection. *Cunningham* v. *Nassau Elec. R. R. Co.*, 40 App. Div. 211, 58 N. Y. Supp. 22.

Id.; notice of motion; waiver of.— The statutory requirement of not less than five days' notice of motion to set aside a verdict may be waived, and is so waived by failure to object on the ground of insufficiency of notice when the motion is made. *Krakower* v. *Davis*, 20 Misc. Rep. 350.

Where a verdict is set aside, if the appellant is entitled to the five days' notice prescribed in section 1369 of the Charter, the right to notice is waived if the objection to its omission is not made at the time. *Scharmann & Sons* v. *Bard*, 60 App. Div. 449, 69 N. Y. Supp. 1033.

Order setting the case down, etc.— An order of this court, vacating and setting aside a judgment against plaintiff absolutely, without setting the case down for pleading, hearing, or trial,— *Held* unauthorized. *Woldock* v. *Tombarelli*, 32 Misc. Rep. 694, 66 N. Y. Supp. 504.

For further authorities under this section, see notes to § 999, Code Civ. Proc.

§ 255. **New trial; fraud or newly discovered evidence.**— The court may also in a proper case, grant or deny a motion for a new trial on the ground of fraud or newly discovered evidence, and from the order an appeal shall lie as from a judgment in said court.

Notes to section 255.

This section is new.

By section 1, "Jurisdiction," subdivision 19, this court is given power to "*grant* a new trial, open a default, or in a proper case *grant* a new trial on the ground of fraud or newly-discovered evidence." That section does not, by its terms, give the court power to *deny* a new trial, the words "*or deny*" being omitted. This jurisdiction or power is however given by this section by express words "grant *or deny*."

In *Robb* v. *Osgoodby*, 20 Misc. Rep. 622, it was held that, under Laws 1896, chap. 748, amending the Consolidation Act, § 1367, an appeal from an order *granting* a new trial was authorized, but that it did not authorize an appeal from an order *denying* a motion for a new trial.

By section 1, subdivision 15, this court has power to grant a stay of proceedings not to exceed five days.

For appeals generally, see tit. IX, "Appeals," §§ 310 to 327.

§ 256. **Court may impose conditions, et cetera.**— The court may award such costs, not exceeding ten dollars, for opening

any default, or vacating, amending, modifying or setting aside any judgment against any party to the action as in its discretion shall be just and proper. It may as a condition for opening any default, or vacating, amending, modifying or setting aside any judgment, order any defendant in default to deposit the amount of the judgment with the clerk of the court or to give an undertaking with sufficient sureties to the effect that such defendant will not sell, assign, or transfer any of his property with intent to hinder, delay or defraud the plaintiff in the collection of his claim or demand, if the plaintiff shall prevail on the trial of such action, and that such defendant or his sureties will pay the amount of any judgment recovered against such defendant in such action.

Notes to section 256.

This section is taken from section 1367 of the Consolidation Act (Laws 1882, chap. 410), which was Laws 1862, chap. 484, § 16. See § 253, "Court may open default," and notes.

Compliance with order.— Where a default is opened upon terms, the defendant must comply with the terms or he will lose the benefit of the order. *Mitchell* v. *Menkel*, 1 Hilt. 142.

As to feeling aggrieved at the terms, noncompliance therewith, and appeal, see *Witowski* v. *Maisner*, 21 Misc. Rep. 487; s. c., 47 N. Y. Supp. 599.

Referee's fees.— A justice of this court has no power however, upon granting a motion to open a default, to order a judgment in favor of the defendant for the fees of a referee before whom the parties were directed by the justice to appear for an examination upon the disputed question of facts as to whether the summons had been served, and the consent of the parties that the unsuccessful one should pay the referee's fees confers no jurisdiction. *Szerlip* v. *Baier et al.*, 21 Misc. Rep. 331.

This court has no power to appoint a referee on consent. *Barber* v. *Lane*, 60 App. Div. 87.

§ 257. An appeal shall lie from an order granting or denying a motion, made as provided in the last four sections; as from a judgment; except, that no appeal shall lie in the first instance from an order opening a default and vacating a judgment entered thereon.

Notes to section 257.

This section is new, and is omitted from the contents or enumeration of sections in title VII, article I, which states only sections 248 to 256. See note to art. 1, "Judgments."

As to appeals generally, see tit. IX, "Appeals," § 310, etc.

Appeal from order opening a default.— This section declares that an appeal shall lie from an order granting or *denying* a motion made as provided in the *last four sections*, as from a judgment. This includes section 253, "Court may open default." Section 257 continues, "except that no appeal shall lie in the *first instance* from an order "*opening*" a default," etc. Thus, after including section 253 by the provisions of the first half of section 257, it is excepted and excluded by the other half of the same section. Assuming that the last declaration, or provision, controls, the situation is that, in three of the sections, sections 253, 254, and 255, an appeal from an order may be taken directly from the order, as if the order was a judgment, or as if the appeal was from the judgment, but, in the case of an order "*opening* a default," no appeal can be taken *directly from the order* in the first instance, but the appeal must be taken from the judgment entered, which, of course, must contain the order. It must be observed that this provision does not apply to an order *denying* a motion to open a default. Laws 1896, chap. 748, amending the Consolidation Act, § 1367, authorized an appeal from an order *granting* a new trial, but did not authorize an appeal from an order *denying* a motion for a new trial; a motion to dismiss the appeal was therefore granted. *Robb* v. *Osgoodby*, 20 Misc. Rep. 622.

Appeal from judgment.— No appeal lies from an order of this court *denying* a motion to open a default; the remedy is by appeal from the judgment. *Beebe* v. *Nassau Show Case Co.*, 41 App. Div. 456, 58 N. Y. Supp. 769.

Noncompliance with terms of order opening default.— Where the defendant's default is opened, by an order, upon terms by which he considers himself aggrieved, he must, in order to procure a review of the terms, appeal from the order, as his appeal from the judgment, after having failed to comply with the terms, is ineffectual for such a review. *Witowski* v. *Maisner*, 21 Misc. Rep. 487; s. c., 47 N. Y. Supp. 599.

On reversal of an order setting aside defendant's default, all proceedings taken thereunder fall, and judgment for defendant rendered pending the appeal from the order must be reversed. *Weinberg* v. *Frank*, 25 Misc. Rep. 788, 56 N. Y. Supp. 920.

NOTE.— There are no sections from 257 to 260.

ARTICLE II.

Execution.

SECTION 260. How issued.
261. Transcript, how to issue; judgment of supreme court; when docketed.
262. When satisfaction of judgment presumed.
263. Real property bound for ten years by a judgment thus docketed.
264. Judgment, and effect of, against defendants jointly indebted when all are not served.
265. Execution; indorsement thereupon.
266. How collected.
267. Judgment, how docketed; effect of docketing.
268. Action against joint debtors.
269. Docketing judgment in another county.
270. Judgment against marshal.
271. Execution; requisites.
272. Arrest.
273. Removal of execution.
274. Judgment in favor of wage-earner.
275. Arrest and sale of property limited.
276. Marshal; when liable to execution.
277. Return of execution and satisfaction of judgment.

NOTE.— The word "Removal," in above contents, section 273, should be "Renewal." See § 273.

§ 260. **How issued.**— An execution may be issued on a judgment of the municipal court at the option of the judgment creditor, either by the county clerk directed to the sheriff as prescribed by law, after the filing of a transcript of judgment, as provided in the next section, or by the clerk of the municipal court in the district in which the judgment was entered, within six years thereafter, directed to a marshal. But no execution shall issue out of the municipal court after a transcript has been issued, and no transcript shall be issued while an execution of the municipal court remains unreturned, except a transcript showing that a judgment has been vacated, set aside or modified.

Notes to section 260.

This section is taken from section 1392 of the Consolidation Act (Laws 1882, chap. 410), by which a judgment creditor had his option

after the filing of a transcript to issue execution either to the sheriff or to a marshal. By the present section no execution can be issued to a marshal after the filing of a transcript, and no transcript can be issued by the clerk while a marshal has an execution.

Section 1392 of the Consolidation Act (Laws 1882, chap. 410) did not contain any time within which an execution could be issued. Provision is now made that it may be issued within six years after the judgment was entered in accordance with the decision in *Diffenbach* v. *Roch*, 112 N. Y. 621; *Herman* v. *Stalp*, 24 N. Y. St. Rep. 40. And see *Herder* v. *Collyer*, 6 N. Y. Supp. 513.

Action to foreclose a lien upon a chattel.— Execution against the person in such an action shall not issue if the provisions of this act relating to the indorsement upon the summons (§§ 38, 39) have not been complied with, and the marshal must make a return that the property is not available for levy and execution. See § 140 of this act.

Execution issued on the day of, but after the debtor's death held void; the law takes notice of fractions of a day when there are conflicting rights.— See § 1380, Code Civ. Proc.; *Wallace* v. *Swinton*, 64 N. Y. 188; Broom's Legal Maxim's 134; *Prentiss* v. *Bowden*, 8 Misc. Rep. 420, 28 N. Y. Supp. 666. See also *Douglass* v. *Seifert*, 18 Misc. Rep. 188.

Id.— Upon judgment for defendant when plaintiff is an executor or administrator. See § 156.

Id.— For return of property, see § 118, this act.

Mechanic's lien actions.— Executions in such actions are provided for by section 3408, Code of Civil Procedure.

Stipulation to issue.— An attorney cannot issue an execution in this court under a stipulation; the clerk must do so, otherwise it is invalid. *Thompson* v. *Jenks*, 2 Abb. Pr. N. S. 229.

Taking oysters out of the Harlem river.— Executions upon recovery in an action for violations of law in this respect are specially provided for by section 770 of the Consolidation Act (Laws 1882, chap. 410).

§ 261. **Transcript how to issue; judgment of supreme court, when docketed.**— The clerk of the court in the district in which a judgment is rendered must, upon the application of the party in whose favor the judgment was rendered, deliver to him a transcript of the judgment, except as provided in the last section. The county clerk of the county in which the judgment was rendered, must, upon the presentation of the transcript and payment of the fees therefor, indorse thereupon the date of its receipt, file it in his office, and docket the judgment, as of the time of the receipt of the

transcript, in a book kept by him for that purpose, as prescribed by law, and if the judgment be one which is rendered for the recovery of a chattel which has been delivered to the unsuccessful party, or for the value thereof, must also enter in the docket the particulars of the judgment as stated in the transcript. Thenceforth the judgment is deemed a judgment of the supreme court and may be enforced accordingly. But nothing in this section shall be construed to prevent the municipal court from vacating, setting aside or modifying the judgment as hereinbefore provided.

Notes to section 261.

This section is taken from section 1392 of the Consolidation Act (Laws 1882, chap. 410), which was the same as section 3019, Code of Civil Procedure.

The change is made to the Supreme Court on account of the abolition of the Court of Common Pleas. Section 1392 of the Consolidation Act made an exception as to the delivery of a transcript in an action to recover a chattel, which provision was embodied in section 1394 of said act; it is now contained in this section, therefore, obviating the necessity of a separate section.

Amendment of judgment after filing transcript.— The court may amend a judgment, after filing the transcript thereof with the county clerk, by correcting first name of defendant, which was fictitious, and so stated in the summons. *Hilton* v. *Sinsheimer*, 5 Civ. Proc. Rep. 355.

Effect of filing transcript.— The filing of a transcript of a judgment does not make it a judgment of the Common Pleas, now Supreme Court, for any other purpose than for its enforcement. *Edel* v. *McCone*, 31 N. Y. St. Rep. 553.

Irregularity.— Where an execution issued upon a judgment docketed in the county clerk's office was issued by the plaintiff's attorney alone, and not by the county clerk,— *Held*, that the irregularities in the form and issuance of the execution were not sufficient to deprive the court of jurisdiction to entertain supplementary proceedings founded thereon. *Bareither* v. *Brosche*, 19 Civ. Proc. Rep. 447.

Mechanic's lien actions.— Transcripts of judgment in these actions are provided for by section 3410, Code of Civil Procedure.

Plaintiff only has right to file transcript.— A judgment debtor has no right to file a transcript of a judgment recovered against him with the county clerk, so as to make an application to have such judgment set off against another in his favor. The Code provides that the clerk shall issue a transcript of a judgment to the party in whose favor the judgment was rendered; the transcript so issued, and none other, is

the only one to be filed with the county clerk. *Cunningham* v. *Eiseman*, 4 Civ. Proc. Rep. 220.

§ 262. **When satisfaction of judgment presumed.**— A final judgment for a sum of money, or directing the payment of a sum of money, heretofore or hereafter rendered, and docketed in the office of a county clerk as prescribed in this article, is presumed to be paid and satisfied after the expiration of twenty years from the time, when the party recovering it was first entitled to a mandate to enforce it. This presumption is conclusive, except as against a person who, within twenty years from that time, makes a payment or acknowledges an indebtedness of some part of the amount recovered by the judgment or decree, or his heir or personal representative, or a person whom he otherwise represents. Such an acknowledgment must be in writing, and signed by the person to be charged thereby.

Note to section 262.

This section is taken from section 376 of the Code of Civil Procedure. It and the following one were made necessary in consequence of the decision in *Dieffenbach* v. *Roch*, 112 N. Y. 621, holding that prior to 1894 a judgment of this court, even though docketed by the filing of a transcript, was only good for six years. By chapter 307, Laws 1894, such judgments, when docketed, were made good for twenty years. See also §§ 376, 382, and 3017, Code Civ. Proc., and the case of *Raphael* v. *Meucke*, 28 App. Div. 91, holding that chapter 307, Laws 1894, amending sections 376, 382, and 3017 of said Code made the twenty years statute of limitations, with its persumption of payment, apply to judgments in this and justices' courts, the same as to judgments of courts of record.

§ 263. **Real property bound for ten years by a judgment thus docketed.**— Except as otherwise specially prescribed by law, a judgment, hereinafter rendered, which is docketed in a county clerk's office, as prescribed in this article where it is for the sum of twenty-five dollars or more, binds, and is a charge upon, for ten years after the filing the judgment roll, and no longer, the real property and chattels real, in that county, which the judgment debtor has, at the time of so docketing it, or which he acquires at any time afterwards, and within ten years.

Notes to section 263.

This section is taken from section 1251 of the Code of Civil Procedure, and the latter part of section 1392 of the Consolidation Act (Laws 1882, chap. 410), with the words, "where it is for the sum of twenty-five dollars or more," added. See note to § 262.

Section 1403 of the Consolidation Act (Laws 1882, chap. 410) made section 3043 of the Code of Civil Procedure, relating to justices' courts, applicable to this court, and it is also included in section 263.

Amount less than $25.— A transcript of a judgment, though for less than $25, may be docketed with the county clerk, and becomes a judgment of the County Court, which can be enforced like other judgments, except it is not a lien on real property. *Candee* v. *Gundelsheimer*, 8 Abb. Pr. 435.

Judgments against persons sued by a fictitious name.— By chapter 318, Laws 1902, section 1251, Code of Civil Procedure, was amended to take effect the same day this act takes effect, viz.: September 1, 1902, by adding thereto after the words, "and within ten years," as follows: "Except that any judgment rendered, having the name, or any part of the name, of the judgment debtor designated as fictitious, shall not bind, or be a charge upon the real property or chattels real of any person. A judgment having the name, or any part of the name, of a judgment debtor designated as fictitious, may be amended at any time within ten years after the docketing thereof, by inserting the true name of said judgment debtor, upon such notice to him as the court may direct, and such judgment shall thereafter be a lien upon the real property and chattels real, which the judgment debtor then has, or may thereafter acquire, but not for a longer period than ten years after the original docketing of such judgment."

§ 264. **Judgment, and effect of, against defendants jointly indebted when all are not served.**— In an action, wherein the complaint demands judgment for a sum of money against two or more defendants, alleged to be jointly indebted upon contract, if the summons is served upon one or more, but not all of the defendants, the plaintiff may proceed against the defendant or defendants, upon whom it is served unless the court otherwise directs; and, if he recovers final judgment, it may be taken against all the defendants thus jointly indebted. Such a judgment is conclusive evidence of the liability of each defendant upon whom the summons was personally served or who appeared in the action, and as against a defendant not summoned, it is evidence only of the

extent of the plaintiff's demand, after the liability of that defendant has been established, by other evidence.

Notes to section 264.

This section, together with sections 265, 266, 267, and 268, applicable to courts of record, are taken from sections 1394, 1395, and 1396 of the Consolidation Act (Laws 1882, chap. 410), and from the sections of the Code of Civil Procedure therein referred to. It combines sections 1932 and 1933 of said Code, applicable to courts of record.

Parties, who may be joined. Parties-plaintiff, or defendant.— See § 42.

Application of this article to defendants jointly liable.—(There is no "article," it is title II, "Actions; Summons; Parties). See § 43.

Partners.— Judgment in an action against copartners is properly rendered against all of them although they were not all served with summons. *Steiger* v. *Theiss*, 19 Misc. Rep. 170. See also *Kramer* v. *Schatzkin*, 27 Misc. Rep. 206, 57 N. Y. Supp. 803, 29 Civ. Proc. Rep. 86.

§ 265. **Execution; indorsement thereupon.**— An execution or a transcript issued upon such a judgment, as prescribed in the foregoing section, must be issued, in form, against all the defendants; and the clerk of the court in the district where such judgment is entered, must indorse thereupon the name of each defendant who was not summoned. If the execution be issued to the sheriff upon a judgment docketed in the office of the county clerk there must be indorsed thereupon a direction to the sheriff, containing the name of each defendant who was not summoned, and restricting the enforcement of the execution, as prescribed in the next section.

Note to section 265.

This section is taken from section 1395 of the Consolidation Act (Laws 1882, chap. 410), which made section 1934 of the Code of Civil Procedure applicable to this court, substituting the duty of the attorney for the judgment debtor, to the clerk of the court, to indorse on the judgment the name of each defendant not summoned. See also notes to § 264.

§ 266. **How collected.**— An execution against the person, issued upon a judgment, as prescribed in section 264 of this act, shall not be enforced against the person of a defendant,

whose name is indorsed thereupon, as not summoned, as prescribed in the foregoing section. An execution against property, issued upon such a judgment, shall not be levied upon the sole property of a defendant not summoned; but it may be collected out of personal property, owned by him, jointly with the other defendants, who were summoned, or with any of them; and out of the real and personal property of the latter, or any of them.

Notes to section 266.

This section is taken from section 1395 of the Consolidation Act (Laws 1882, chap. 410), which made section 1935 of the Code of Civil Procedure applicable to this court, and is substantially the same as the latter.

See also notes to § 264.

§ 267. **Judgment how docketed; effect of docketing.**— Where a judgment has been taken, as prescribed in section two hundred and sixty-four of this act, the clerk of the court in the district in which the judgment is entered, must write upon his docket, and the county clerk with whom a transcript is filed, as provided in this act, must write upon his docket, opposite or under the name of each defendant, upon whom the summons was not served, the words "not summoned." The judgment does not, by virtue of its being docketed, bind any real property, or chattel real, owned by such a defendant. But this section does not affect the plaintiff's right of action, to charge the judgment upon any real property.

Notes to section 267.

This section is taken from sections 1396 and 1400 of the Consolidation Act (Laws 1882, chap. 410), the former of which made section 1936 of the Code of Civil Procedure applicable to this court, adding the provision requiring the clerk of this court to docket the judgment.

See also notes to § 264.

§ 268. **Action against joint debtors.**— After the recovery of a judgment against joint debtors, as prescribed in section two hundred and sixty-four of this act, an action may be maintained by the judgment creditor, against one or more

of the defendants who were not summoned in the original action, to procure a judgment charging his or their property with the sum remaining unpaid upon the original judgment.

Notes to section 268.

This section is taken from section 1396 of the Consolidation Act (Laws 1882, chap. 410), which made section 1937 of the Code of Civil Procedure applicable to this court, and this section is substantially the same as the latter.

See also notes to § 264.

Action in any court.— The defendant not summoned may be sued *in any court* having jurisdiction of the action. *Johnson* v. *Smith*, 14 Abb. Pr. 421; *Frickman* v. *Kennedy*, 4 Abb. N. S. 417.

Judgment; partners.— A summons issued in 1892 against defendant and his partner was served on the latter alone, and judgment was taken against both, and against the partner personally, and in 1898, before the statute expired, an action was brought against the partner as sole defendant, under a second judgment taken against him. *Held*, in an action thereafter against defendant alone, to charge him under the Code of Civil Procedure, section 1937, that he could not avail himself of the statute under section 1939, since that defense did not exist when the first action was brought, the provisions of the Code having been made applicable to this court by section 1396 of the Consolidation Act, and section 1369 of the Charter of 1897. *Kramer* v. *Schatzkin*, 27 Misc. Rep. 206, 57 N. Y. Supp. 803, 29 Civ. Proc. Rep. 86.

§ 269. **Docketing judgment in another county.**— The county clerk with whom a transcript is filed, as prescribed in this act, must furnish to any person applying therefor, and paying the fees allowed by law, one or more transcripts of the docket of the judgment, attested by his signature. A county clerk to whom such a transcript is presented, must, upon payment of the fees therefor, immediately file it, and docket the judgment in the appropriate docket-book kept in his office, in like manner as the judgment was docketed by the first county clerk. The judgment, when docketed, as prescribed in this section, has the like effect, with respect to the enforcement thereof, or any proceedings thereunder, or by virtue thereof, in the county where it was so docketed, as it has in the county in which it was docketed upon the transcript from the municipal court.

Notes to section 269.

This section is taken from, and is substantially the same as section 1397 of the Consolidation Act (Laws 1882, chap. 410), which was the same as section 3022 of the Code of Civil Procedure.

Transcript.— To make the judgment enforceable in any other county within the city, a transcript must first be docketed in the county in which it was rendered, and a transcript of the latter judgment be filed and docketed in the county where it is going to be enforced, the clerk of the last-mentioned county issuing the execution. *Matter of Stumpp*, 32 Misc. Rep. 41, 66 N. Y. Supp. 172.

§ 270. **Judgment against marshal.**— Whenever any judgment shall be rendered against any city marshal or his sureties, in any district of the municipal court, a transcript thereof shall be filed with the county clerk in the county wherein such district of the municipal court is situated, and from the filing of such transcript such judgment shall be deemed to be a judgment of the supreme court and shall be enforced in the same manner as other judgments of that court. And no execution on such judgment shall issue to any other officer, than the sheriff, and all such executions must be made returnable to the county clerk

Notes to section 270.

This section is taken from section 1398 of the Consolidation Act (Laws 1882, chap. 410).

The word "district" means *judicial* district.

Return of execution.— See *Bartels* v. *Cunningham*, 8 Abb. N. C. 226.

§ 271. **Execution; requisites.**— The execution, when issued out of the municipal court, must be directed to a marshal, subscribed by the clerk of the court, in the district in which the judgment was rendered, or by his successor in office, and must bear date of the day of its delivery to the officer to be executed. It must intelligibly refer to the judgment by stating the names of the parties, the district where, and the time when rendered, and the amount of the judgment, and if less than the whole is due, the true amount due thereon; it must require of the marshal, substantially as follows:

1. If it be a case where the defendant cannot be arrested, it must direct the officer to collect the amount of the judg-

ment, or the amount due thereon, out of the personal property of the debtor, and to pay the same to the party entitled thereto.

2. If it be a case where the defendant may be arrested, in addition to the foregoing, it may direct the officer, if sufficient property of the defendant liable to execution cannot be found to satisfy the judgment, that he arrest the defendant and commit him to the jail of the county wherein the district in which the judgment was entered is situate, until he pay the judgment or be discharged according to law.

3. It must further, in all cases, direct the officer to make return of the execution and a certificate thereon showing the manner in which he had executed the same, in twenty days from the time of his receipt thereof, to the court from which the execution issued.

Notes to section 271.

This section is substantially the same as section 1399 of the Consolidation Act (Laws 1882, chap. 410), which was the same as section 52, chapter 344, Laws 1857.

Section 1403 of the Consolidation Act (Laws 1882, chap. 410) made section 3024 of the Code of Civil Procedure, relating to justices' courts, applicable to this court. The latter section prescribes the time within which an execution may be issued by the justice, and is substantially covered by the present section, subdivision 3.

See also § 272, and notes.

Attachment.— As to execution where property has been attached, see § 91.

Causes of action united; arrest.— Where a cause of action for which a defendant might be arrested is united with a cause of action for which he cannot be arrested, an execution against the person of the defendant cannot be issued upon the judgment. See § 146, subd. 6.

Description.— The debtor must be correctly described by the judgment and execution. The marshal can only execute the process against the property of the person named therein. It is not enough that the right person be made to pay the debt. *Farnham* v. *Hildreth*, 32 Barb. 277.

Id.; execution against the person.— An execution against the body of the defendant must state in the judgment and the docket that the case is one in which the defendant is subject to arrest and imprisonment.

Carpentier v. *Willett*, 18 How. Pr. 400; s. c., 6 Bosw. 25; less fully reported, s. c., 31 N. Y. 90, affg. 6 Bosw. 25, 28 How. 225.

Exemption of property from levy and sale under execution. See §§ 1389 to 1404, inclusive, Code Civ. Proc.

Levy upon personal property, when superseded by appeal.—See § 1311, Code Civ. Proc., and notes to § 316.

Marshal's return is presumptive evidence in an action against sureties. See § 127.

Mechanic's lien actions.—Execution may be issued upon a judgment obtained in an action to enforce a mechanic's lien against real property *in a court not of record*, which shall direct the officer to sell the title and interest of the owner in the premises, upon which the lien set forth in the complaint existed at the time of filing the notice of lien. Code Civ. Proc., § 3048.

Replevin.—Contents of executions in action in replevin. See § 124 and notes.

Sale on execution.—When and how conducted. See § 1384, Code Civ. Proc.

Id.; notice of, penalty for tearing down, or defacing.—§ 1385, Code Civ. Proc.

Id.; purchases on such sales by certain officers prohibited.—§ 1387, Code Civ. Proc.

Id.; validity of sale when not affected by marshal's default.—§ 1386, Code Civ. Proc.

Trespass of marshal; judgment creditor.—A judgment creditor is not liable for the trespass of the marshal in making a wrongful levy, unless he aided, abetted, directed, or took some part therein. *Fischer* v. *Hetherington*, 11 Misc. Rep. 575.

§ 272. **Arrest.**—When the execution directs the arrest of the defendant for want of sufficient personal property, if there be not sufficient subject to levy known to the officer, or if upon demand by the officer of the defendant, he fail to produce sufficient property, the officer may, without further delay, arrest the defendant; when arrested, the defendant must be conveyed to the common jail of the county, wherein the district where the judgment is entered is situate, and there kept in custody until the execution, with costs, be paid, or be discharged by due course of law.

Notes to section 272.

This section is substantially the same as section 1401 of the Consolidation Act (Laws 1882, chap. 410), which was the same as section 54, chapter 344, Laws 1857.

See also §§ 266, 271, and notes.

Action to foreclose a lien upon a chattel.— The marshal must make a return on the execution to the clerk that the property is not available for levy and execution before execution against the person can issue. § 140.

§ 273. **Renewal of execution.**— An execution may, at the request of the judgment creditor, be renewed before the expiration of the twenty days by the word "renewal" being written thereon, with the date thereon, subscribed by the clerk of the court or his assistant; such renewal has the same effect as an original issue, and may be repeated as often as may be necessary. If an execution be returned unsatisfied, others may be issued on the like request from time to time until the judgment be satisfied.

Notes to section 273.

This section is substantially the same as section 1402 of the Consolidation Act (Laws 1882, chap. 410), which was the same as section 55, chapter 344, Laws 1857.

Section 1403 of the Consolidation Act made section 3027 of the Code of Civil Procedure, relating to justices' courts, applicable to this court, and it is also included in section 273.

§ 274. **Judgment in favor of wage earners.**— In an action, brought in the municipal court, by a journeyman, laborer, or other employee whose employment answered to the general description of wage earner, for services rendered or wages earned in such capacity, if the plaintiff recovers a judgment for a sum not exceeding fifty dollars, exclusive of costs, and the action shall have been brought within one month after the cause of action accrued, no property of the defendant is exempt from levy and sale by virtue of an execution against property, issued thereupon; and, if such an execution is returned wholly or partly unsatisfied, the clerk must, upon the application of the plaintiff, issue an execution against the person of the defendant for the sum remaining uncollected, if the indorsement required by this act to the effect that defendant was liable to arrest was complied with. A defendant arrested by virtue of an execution

so issued against his person, must be actually confined in the jail, and is not entitled to the liberties thereof; but he must be discharged after having been so confined for fifteen days. After his discharge another execution against his person cannot be issued upon the judgment, but the judgment creditor may enforce the judgment against property as if the execution, from which the judgment debtor is discharged, has been returned, without his being taken.

Notes to section 274.

This section is taken from section 1405 of the Consolidation Act (Laws 1882, chap. 410), which was the same as section 3321 of the Code of Civil Procedure.

The Commissioners of Revision, in a note to this section, say that it "is substantially the same as section 1405 of the Consolidation Act, the only change being that the words 'if the indorsement required by this act to the effect that defendant was liable to arrest was complied with,' are added after the words 'remaining uncollected.'"

A comparison will show that this is incorrect. Section 1405 related only to a "working *woman*," as expressed in the title, and in the text to "a *female* to recover for services performed by her," whereas by section 274 the expression is "a journeyman, laborer, or other employee whose employment answered to the general description of wage-earner for services rendered, or wages earned in such capacity." No such words, or expression, are found in section 1405, and it is obvious that male as well as female have been included. The section then proceeds to require not only that a judgment for a sum not exceeding $50 shall be recovered, and that "the indorsement required by this act (§ 39), to the effect that defendant was liable to arrest, was complied with, but also, that "*the action shall have been brought within one month after the cause of action accrued.*" No limitation whatever as to when the action must be brought is contained in section 1405, therefore this is another change, and a most radical one.

The wage-earner "had *six years* to sue on his contract with his employer, and obtain the benefits of a judgment and execution for arrest." Now he is limited to *one month*. It is the shortest statute of limitation in which to commence an action ever enacted.

Action by employee.— See § 44, "Where employee is a party."

Amount less than $50.— The issue of an execution against the person, on a judgment obtained by a female for services less than $30, under section 1405 of the Consolidation Act, after a return of execution against property unsatisfied, cannot be issued unless the judgment and docket contains a statement that defendant is subject to arrest and imprisonment as provided in section 1386, the duty of the clerk in

issuing the execution being purely ministerial. *People ex rel. Rosenzweig* v. *Costigan*, 54 App. Div. 186.

Costs in action by working woman.— See § 340.

Marshal must discharge party imprisoned under execution after fifteen days' confinement. *Padreshefsky* v. *Walton*, 65 App. Div. 432.

Nurse.— Where services are rendered by a woman as a nurse in a family, she is entitled to the benefit of this section, but she cannot have $10 extra costs under sections 3222 and 3131 of the Code of Civil Procedure. *Dillon* v. *Porter*, 12 Week. Dig. 207.

Statement in judgment.— Under sections 1383 and 1405 of the Consolidation Act, a female having a judgment for less than $50. rendered for services, execution on which has been returned unsatisfied, cannot have execution issue against the person of the judgment debtor, unless the justice has caused to be inserted in the judgment a statement that defendant is subject to arrest. *Matter of Rosenzweig*, 66 N. Y. Supp. 376.

§ 275. **Arrest and sale of property limited.**— A defendant cannot be arrested nor his property sold on execution after twenty days from its issue or renewal, but property levied on within the twenty days, may be sold after renewal.

Note to section 275.

This section is the same as section 1406 of the Consolidation Act (Laws 1882, chap. 410), which is the same as section 56, chapter 344, Laws 1857.

§ 276. **Marshal; when liable to execution; creditor.**— A marshal is liable to a party in whose favor an execution is issued to him for the amount thereof in the following cases:

1. Where he suffers the twenty days to elapse without making a true return thereof, and filing the same with the clerk of the court, and paying to him or to the party entitled thereto, the money collected thereon by him.

2. Where he willfully or carelessly omits to levy on property of the defendant, or if the defendant be liable to arrest, to arrest and imprison him within the twenty days, or having arrested the defendant, fails to commit him to the county jail within the twenty days.

Notes to section 276.

This section is the same as section 1407 of the Consolidation Act (Laws 1882, chap. 410), which is the same as Laws 1857, chap. 344, § 57.

As to "marshals," generally, see tit. VIII, art. II, §§ 293 to 306; as to "marshals' fees," see §§ 354 and 356; under the latter section the marshals' "fees" and "expenses" are tabulated.

Agreement with debtor.—A marshal to whom an execution had been duly delivered made an agreement with the judgment debtor without the knowledge or consent of the judgment creditor or his attorney, a day or two before the execution was returnable, to await payment one week, and on the return day, at his own instance, procured from the clerk of the court a renewal of the execution, and afterward returned the execution unsatisfied, the judgment debtor having, after the renewal, left for parts unknown. *Held*, that the marshal was liable to the judgment debtor for such damages as the latter had sustained by reason of the neglect of duty by the marshal. *McGuire* v. *Bausher*, 52 App. Div. 276, 65 N. Y. Supp. 382.

Defendant, to whom an execution was delivered as marshal, extended the judgment debtor's time for payment beyond the time specified therein, and, without consultation with the judgment creditor, procured its renewal, and finally returned it unsatisfied, and the attorney for the creditor testified that on the day execution issued he saw the judgment debtors in possession of property more than sufficient to satisfy it, which he told witness belonged to him. *Held*, that the evidence was sufficient to establish a claim for damages by reason of defendant's renewal of the execution. *McGuire* v. *Bausher*, 57 App. Div. 201, 68 N. Y. Supp. 284.

Contempt; error or mistake of marshal.— Misbehavior in office, willful neglect of duty, and disobedience to a lawful mandate of the court, all imply bad faith and not a simple mistake or error of judgment. If a party to an action is injured by a mistake of the sheriff in the discharge of an official duty, he can hold him and his sureties liable in damages, but cannot proceed against him as for a contempt. He should not be fined and imprisoned because he did not correctly decide difficult and important questions at law, in relation to which learned counsel differ and on which the court may well hesitate. *Second Nat. Bank of Oswego* v. *Dunn*, 63 How. 434.

Delegation.— When an execution is duly issued to a marshal it becomes his duty to execute it in person. He has no power to substitute another marshal in his place. *Downs* v. *M'Glynn*, 2 Hilt. 14, 6 Abb. Pr. 241.

Fictitious name.— Where an attachment against the property of a person whose first name appears on the face thereof was fictitious, such attachment and all proceedings thereunder are absolutely void, and a marshal who executes such process will be equally liable with the attaching creditor in an action for conversion of the goods levied upon; and notwithstanding the evidence clearly shows that the party against whom it was intended to proceed by attachment is the owner of the property taken. *Patrick* v. *Solinger*, 9 Daly, 149.

A levy upon goods of a person served without having properly specified a fictitious name, under a judgment recovered in the action, is a trespass. *Fischer* v. *Hetherington*, 11 Misc. Rep. 575.

Exemption.— It is not necessary to claim the exemption of chattels levied on at the time of the levy, but notice to the sheriff at any time before actual sale is sufficient, and notice having been given, the exemption is not waived by the presence of the debtor at the sale on execution of the goods levied upon under an attachment, without then claiming exemption. *Hartmann* v. *Wood*, 57 App. Div. 23.

Indemnity for a levy; sureties.— The acceptance by a marshal of a sum of money as indemnity for a levy, instead of an undertaking, is not an act within his official capacity, so as to make the sureties on his bond liable on his failure to return the money. *De Sisto* v. *Stimmel*, 31 Misc. Rep. 711, 65 N. Y. Supp. 314.

Insufficient process.— The mere possession of personal property by an officer who took it under insufficient process is enough to sustain an action against him. *Oberwarth* v. *McLean*, 7 Daly, 70.

Money not collected.— A constable does not incur the statutory penalty of being liable for the amount of the execution by a failure to make and file a return within the twenty days, where he has not collected any money under the execution. *Curry* v. *Farley*, 8 Daly, 228.

Property taken and no return.— In an action against a constable and his sureties it is proper to join claims that he took sufficient goods on plaintiff's execution to satisfy it; that he has failed to make return and keeps and detains the money. *Moore* v. *Smith*, 10 How. 361.

Protection.— It is well settled that process regular and valid on its face, issuing from a court having authority to issue it, and possessing jurisdiction of the subject-matter to which the process relates, protects the ministerial officer executing it. *Imbert* v. *Hallock*, 23 How. Pr. 456; *Day* v. *Bach*, 87 N. Y. 61. See also *Crounse* v. *Johnson*, 47 N. Y. St. Rep. 559; s. c., 65 Hun, 337.

Where a replevin process is valid on its face, the sheriff has no right to look behind or beyond it, and he will be protected if he obeys it. *Second Nat. Bank of Oswego* v. *Dunn*, 63 How. 434; s. c., 2 Civ. Proc. Rep. 259.

An officer, acting under process apparently valid, but actually void, may avail himself thereof for defense but not for aggression. Where therefore an officer, who, by virtue of a process valid upon its face but void for want of jurisdiction in the court issuing it, has levied upon and takes possession of property, brings an action to recover the property against another officer, who, by virtue of process against the owner, apparently valid, has taken it from plaintiff's possession, the character of such possession is a subject of inquiry and attack, and the invalidity of the process under which plaintiff acted may be shown; but defendant's process protects him, and its validity cannot be assailed. Plain-

tiff's process however and his possession under it establish, *prima facie*, a right of action. *Clearwater* v. *Brill*, 4 Hun, 728; revd., *Clearwater* v. *Brill*, 63 N. Y. 627.

A requisition upon the sheriff in an action to recover the possession of personal property only protects him in taking the property specified from the possession of the defendant named; where however the actual possession remains in the defendant, although there has been a transfer of title and a constructive change of possession, the process is a protection. *Bullis* v. *Montgomery*, 50 N. Y. 352.

Recovering back money paid to marshal.— The payment to a marshal of money by a wife, the owner of property, to secure it from a threatened seizure under an execution against her husband, is not a voluntary payment, and can be recovered back in an action against the marshal. *Coady* v. *Curry*, 8 Daly, 59.

Release.— The sheriff being once relieved from liability, the court has no power to renew the liability. *Lewis* v. *Stevens*, 93 N. Y. 57.

Stranger's property.— Where a sheriff, under a warrant of attachment, seizes property in the possession, and owned by, a person other than the one against whose property the warrant is issued, he is liable in an action of replevin to such person. *Deutsch* v. *Reilly*, 8 Daly, 132.

Wrong district.— Where, after levy of execution, the judgment is reversed upon appeal, because an objection, taken at the trial, that the action was brought in the wrong district, was overruled, which "is cause only of reversal on appeal, and does not otherwise invalidate the judgment," no action can be maintained against the officer levying the execution as for a wrongful taking of the property levied on. *Barrowcliff* v. *Harrison*, 9 Daly, 473.

§ 277. **Return of execution and satisfaction of judgment.**— Whenever an execution has been returned satisfied in whole or in part, where a transcript of the judgment has been filed in the county clerk's office, a certificate thereon, signed by the clerk of the court in which the judgment was rendered may be filed in the office of the clerk of the county, who shall thereupon enter satisfaction for the amount so satisfied; judgments docketed in these courts may be satisfied in the same manner as judgments docketed in courts of record.

Note to section 277.

This section is the same as section 1408 of the Consolidation Act (Laws 1882, chap. 410), which is the same as Laws 1857, chap. 344, § 58. "These courts" in this section mean *this court*, as there is only *one* court.

NOTE.— There are no sections from 277 to 282.

TITLE VIII.

ARTICLE I. Clerks and officers.
II. Marshals.

ARTICLE I.

Clerks and Officers.

SECTION 282. Duties of clerk.
283. To collect and account for fees, et cetera.
284. Docket, what to contain.
285. Entries, how to be made.
286. Index.
287. To be delivered by clerk to his successor.
288. Successor may issue execution on former unsatisfied docket.
289. Certified copies; prima facie evidence.

Notes to title VIII, article I.

The commissioners appointed to revise and codify the laws relating to this court by chapter 218, Laws 1901, in their report to the Legislature, under the above contents, say in a note, "The provisions of sections 1373 and 1378 of the Charter are not included in this act, but are preserved as Charter enactments."

Section 1383 of the Charter has not been repealed or disposed of, and is preserved as a Charter enactment. It relates to provisions for the removal of the clerks, and should have been included in the above note.

These *three* sections are as follows:

Clerks and assistant clerks.

CHARTER, § 1373.—There shall be in and for each district a clerk of said court and in each district in the boroughs of Manhattan, Brooklyn, The Bronx, and the first district of Queens, an assistant clerk, who shall be appointed by the justice elected in said district, as hereinafter provided, and shall hold office for the term of six years from the date of appointment; and before entering upon his duties each such clerk or assistant clerk shall file in the office of the comptroller of The City of New York a bond in the

penal sum of five thousand dollars, conditioned for the faithful discharge of his duty and the due accounting for and payment of all money by him received or with him deposited in any action as such clerk or assistant clerk, to be approved by the said comptroller to be indorsed thereon. Each such clerk and assistant clerk shall receive a salary of three thousand dollars per annum, except in the boroughs of Queens and Richmond, wherein the salary of the clerks and assistant shall be two thousand dollars per annum each. Such salaries shall be paid in equal, monthly installments; and neither said clerks nor assistant clerks nor other employees of said court shall receive any fee or compensation whatever for their own use for any services performed by them by virtue of their offices other than their salaries; and the duties of such clerks and assistant clerks shall be the same as those now imposed by law upon the clerks and assistant clerks of the district courts in The City of New York. No such clerk, assistant clerk or other employee of such courts shall hold any other office or be interested in any other business, except as permitted by the next section, but shall give their whole time to their respective duties and shall reside in the borough in which the district for which they are appointed respectively is situated. For any breach of said bond the appellate division of the supreme court or any justice of the supreme court in the judicial department wherein the district for which such clerk or assistant clerk is appointed is situated, may order the same to be prosecuted in the name of any person

damaged by such breach. The clerks, assistant clerks, stenographers, interpreters and attendants of the district courts in The City of New York, and of the justices' courts of first, second and third districts of the city of Brooklyn, who shall be in office on the first day of January, eighteen hundred and ninety-eight, shall continue until the expiration of their respective terms, in the like capacities as officers of the said municipal court. Each justice upon appointing a clerk or assistant clerk shall make duplicate certificates of such appointments, stating the term of the appointment and when it will expire, and one of such duplicates shall be filed by him in the office of the city clerk, and the other with the secretary of the board of justices provided for in the next section. The said justices shall in like manner also appoint the officers necessary to attend the court in each district, not exceeding three, at an annual salary of one thousand dollars, and a stenographer in and for each district at an annual salary of two thousand dollars, and in and for each district in the boroughs of Manhattan and Brooklyn an interpreter at an annual salary of twelve hundred dollars. Each of said attendants, stenographers and interpreters shall be appointed for two years or to fill the residue of an unexpired term. The said justices may remove any of said attendants, stenographers or interpreters, provided that before removal such officers shall have notice of the cause of their proposed removal and an opportunity to make an explanation; and the reasons for any removal shall be briefly entered on such minutes.

Notes to Charter section 1373.

This section is taken from the Consolidation Act (Laws 1882, chap. 410), §§ 1427, 1429, 1430, 1432, and 1434.

Section 1427 was superseded by section 1373 of the Charter of 1897 (Laws 1897, chap. 378).

Section 1373 was amended by Laws 1899, chapter 699, so as to include an interpreter for each district in the borough of Brooklyn.

Section 1429 was repealed by Laws 1902, chapter 580, and now constitutes section 283 of this act.

Sections 1430, 1432, and 1434 were also superseded by section 1373 of the Charter (Laws 1901, chap. 466), which latter has been left unrepealed.

Appointment.—The power conferred by the Charter section 1351 upon justices elected or appointed pursuant to the act to appoint clerks of their courts for the term of six years does not apply to an existing justice of the peace in Brooklyn who is transferred by the act into this court. *Stuber* v. *Coler*, 164 N. Y. 22, 58 N. Y. St. Rep. 17, revg. 49 App. Div. 88, 63 N. Y. Supp. 723.

Assistant clerk can hold two civil offices simultaneously.— *Gilchrist* v. *Murray*, 73 N. Y. 535, revg. 8 Daly, 347.

Id.; no second assistant clerk.— The effect of the adoption of the Charter of 1897 was to authorize the retention of a clerk and an assistant clerk of each of the former district civil courts of Brooklyn; and all other clerkships in connection therewith were abolished, and a second assistant clerk, though a veteran, has no right to a mandamus retaining him in office. *People ex rel. Joyce* v. *Van Wart*, 36 App. Div. 518, 55 N. Y. Supp. 68; aff'd., without opinion, in 158 N. Y. 721.

Attendant.— Definition of "term," as applied to term of office. See *People ex rel. Batcy* v. *Tierney*, 31 App. Div. 309.

Constitutionality of, was questioned in *Green* v. *The Mayor, etc.*, 5 Abb. 507, upon the ground that it violated the provisions of the Constitution which give the election or appointment of the clerks to the people, or to the local authorities.

Definition of the word "clerk."— See § 360, subd. 3, and § 3343, subd. 4. Code Civ. Proc.

Interpreter.— It is now settled that in order to become entitled to salary as an interpreter, he must be able to speak at least two languages. *Conroy* v. *The Mayor*, 6 Daly, 49; aff'd., 67 N. Y. 610.

Id.; not an officer of the city government.— The interpreter of a District Court is an officer of the court and not an officer of the city government, and he is not prohibited from holding two offices at the same time. *Goettman* v. *The Mayor*, 6 Hun, 132.

Id.; can hold two civil offices simultaneously.— See cases cited under § 1549 of the Charter, p. 871. Second edition Charter by Ash, 1901.

Janitor not an officer.— A janitor of a District Court in the city of New York is not an officer but an employee under the city government. *Sullivan* v. *The Mayor*, 48 How. 238.

Member of Assembly may be appointed clerk.— Article 3 of section 7 of the Constitution of the State of New York, which provides that "No member of the Legislature shall receive any civil appointment within this State, or the Senate of the United States, from the Governor, the Governor and Senate, or from the Legislature, or from any city government, during the time for which he shall have been elected, and all such appointments and all votes given for any such member for any such office or appointment shall be void," does not render invalid an appointment by a justice of a member of assembly to a clerkship — such a justice not being an officer of the city government. *Stewart* v. *Mayor, etc.*, 15 App. Div. 548.

Not officers of city government.— Clerks of this court are not such officers as are connected with the political organization of the city government. *Whitmore* v. *The Mayor*, 67 N. Y. 21, affg. 5 Hun, 195, followed in *People ex rel. Gilchrist* v. *Murray*, 73 N. Y. 535, revg. 8 Daly, 347.

Duty of clerk.— As to the *duty of the clerk* in keeping and paying out moneys received by him as such, and instructions and advice generally as to his official duties, see *In the Matter of Spear*, "Law Journal" of January 16, 1901, where the opinion of the Appellate Division is published in full. The case is referred to in 56 App. Div. 625, as follows: "*In the Matter of Howard Spear*, charges dismissed; opinion by Hatch, J. (opinion not published by direction of the court). See also as to this case note to Charter § 1383.

As to removal of clerk, see Charter § 1383, and cases cited.

Tenure of office.— This section does not include an officer appointed to hold office at the pleasure of the appointing power. It was intended to cover only officers of the court, appointed for a fixed term of office. *In re Batcy*, 31 App. Div. 309; s. c., 52 N. Y. Supp. 871; *In re Goodwin*, 30 App. Div. 418; s. c., 51 N. Y. Supp. 355. See however *McKenna* v. *City of New York*, 34 App. Div. 152; s. c., 54 N. Y. Supp. 634; *People ex rel. Joyce* v. *Van Wart*, 25 Misc. Rep. 215, 55 N. Y. Supp. 68.

A justice has power to appoint a clerk to serve during the unexpired portion of his term of office. *Stuber* v. *Coler*, 164 N. Y. 22, revg. 49 App. Div. 88; s. c., 63 N. Y. Supp. 723.

Stenographer.— The fees of stenographers for transcript of minutes on appeal are ten cents for every hundred words. § 353.

Term of office.— The term of office of the clerks of the District Courts in the city of New York is for a period of six years, and is not dependent upon the expiration of the term of office of the justice. *People ex rel. Healy* v. *Leask*, 67 N. Y. 521.

For the various laws concerning the appointment of these clerks, and their terms of office since 1851, see the able opinion of the lamented Judge Hamilton W. Robinson, in above case, reported in *People ex rel. Healy* v. *Leask*, 6 Daly, 517, which was affirmed on appeal.

One appointed to the office of clerk of these courts, on the death, resignation, or removal of an incumbent thereof, prior to the expiration of his term of office, is appointed for a term of six years from the date of the appointment. *People ex rel. Clarke* v. *Breen*, 53 N. Y. Super. (J. & S.) 167.

In court of justice of peace of first district of Brooklyn, term of office not affected by an action of the board of estimate, etc., of the city of New York, as to his compensation. *McKenna* v. *City of New York*, 34 App. Div. 152; affd., Court of Appeals, 160 N. Y. 658.

Clerks to administer oaths.

CHARTER, § 1378. The clerks and assistant clerks of the said municipal court are authorized to administer oaths in The City of New York in the same manner and with the like effect as clerks of courts of record.

Notes to Charter section 1378.

This section supersedes section 1431 of the Consolidation Act (Laws 1882, chap. 410).

By section 282, subdivision 5, of this act, it is made the duty of the clerk "to administer oaths in an action, in the presence of the court and under its direction." The word "clerk" includes "assistant clerk" by subdivision 3, section 360.

Officer, etc., may charge fee paid for oath, postage, etc.— See § 3291, Code Civ. Proc.

No fee for administering certain oaths.— See Code Civ. Proc., § 3289.

Fees generally.— See notes to § 282.

Removal.

CHARTER, § 1383. The justices of said court and the clerks and assistant clerks thereof may be removed for cause after due notice and an opportunity of being heard by the appellate division of the supreme court in the judicial district wherein the dis-

trict for which said justices were elected or appointed, or wherein the district for which such clerks or assistant clerks were appointed, is situated.

Notes to Charter section 1383.

See also Const. 1894, art. 6, § 17, and Laws 1880, chap. 354, § 25.

Charges and hearing.— The application must be to the Appellate Division, upon specific charges, with opportunity to the representatives of the city to prove the charges, and to the accused to be represented by counsel, to cross-examine the witnesses produced to prove the charges, and to call others in defense. *Matter of Du Mahaut*, 43 App. Div. 56, 59 N. Y. Supp. 353. See also *In re Thomas*, 2 N. Y. Supp. 38.

Neglect of duty; carelessness and neglect.—When paying out money to parties, or their attorneys, clerks should take a proper receipt therefor; should keep the city's money separate from their own, and should properly account for the same; should deposit the money in a bank and no checks should be drawn thereon except such as relates exclusively to the court's business, and such as the clerk is required to discharge in the ordinary course of his duties. *In the Matter of Spear*, Law Journal, January 16, 1901, where the opinion of the Appellate Division is published in full. The case is referred to in 56 App. Div. 625, as follows: "*In the Matter of Howard Spear*, charges dismissed; opinion by Hatch, J. (opinion not published by direction of the court)." The opinion contains instructions to the clerk, how he is to keep and pay out moneys received by him, and also instructions and advice generally as to his official duties. See also notes to § 282, "Duties of the clerk."

§ 282. **Duties of the clerk.**— It shall be the duty of the clerk of the court in each district:

1. To keep the seal of the court, and affix it to the certificate of the transcript of the docket of judgment, or any other certificate, when required so to do.

2. To record the proceedings of the court.

3. To keep the records and other books appertaining to the court.

4. To file papers delivered to him for that purpose in any action.

5. To attend the sitting of the court of which he is clerk, to administer oaths in an action, in the presence of the court

and under its direction, and to receive the verdict of the jury, and in the absence of the justice to adjourn causes to a time agreed upon between the parties or, when no justice appears, to adjourn causes to the next judicial day.

6. To authenticate by certificate or exemplification, as may be required, the records or proceedings of the court, or any other papers appertaining thereto and filed with him.

7. To exercise the powers and perform the duties conferred and imposed upon him by this act.

8. In the performance of his duties to conform to the direction of the court.

9. To keep his office open for the transaction of business, every judicial day, from nine o'clock in the forenoon to four o'clock in the afternoon.

Notes to section 282.

This section is taken from section 1428 of the Consolidation Act (Laws 1882, chap. 410), which is the same as Laws 1857, chap. 344, § 72, adding to subdivision 5 the power to the clerk, in the absence of the justice, to adjourn causes to a time agreed upon between the parties, or to the next judicial day.

We suppose the words "any action" in subdivision 4 might be held to also include "any proceeding," so as to include a summary proceeding.

The word "clerk" includes "assistant clerk" by subdivision 3, section 260.

As to other duties of the clerk as specified in subdivision 7, and not included in this title and article, see §§ 3, 18, 29, 30, 39, 44, 75, 205, 215, 232, 234, 238, 242, 251, 260, 261, 265, 267, 271, 277, 311, 316, 317, 339, 341, 343, 347, 349 and 350, and Charter §§ 1373 and 1378.

"Fees property of the city." See § 349.

As to "Fees payable to clerks," see § 347.

For *Tabulated* fees of the clerk, see end of § 356.

Certificate of fines of jurors to be sent to commissioner of jurors; penalty for neglect.— See § 233.

Duties are ministerial; mandamus.— The duties of the clerk are entirely ministerial (*Dalton* v. *Laughlin*, 4 Abb. N. C. 188), and therefore he cannot be required to insert in a transcript anything that does not appear in and by the judgment itself. A motion for a mandamus for that purpose was therefore denied. *People ex rel. Fox* v. *Clerk Eleventh Dist. Ct.*, McAdam, J., N. Y. L. J., March 30, 1894.

Fees.—All fees shall be prepaid before the service shall be performed. See § 347, subd. 7.

Id.; to be paid before required to transmit papers.— See Code Civ. Proc., § 3292.

Id.; no service until fees paid.— See § 283.

Id.; clerk to collect and account for.— See § 283.

Id.; property of the city.— See § 349.

Id.; general provision as to fees to be accounted for.— See § 3286, Code Civ. Proc., and § 283 of this act.

Id.; penalty for extortion.— For violation of any of the provisions of sections 3280 and 3281 of the Code of Civil Procedure, see § 3282, Code Civ. Proc.

Id.; taking for service not rendered, prohibited.— See § 3281, Code Civ. Proc.

Id.; taking fees not prescribed by law, prohibited.— See § 3280, Code Civ. Proc., and § 347 of this act. See also §§ 3281 and 3282, Code Civ. Proc.

Transcript.— The clerk of the court in the district in which judgment, where defendant is liable to arrest, is entered must, in any transcript issued by him, insert the words "defendant liable to execution against his person." See § 251.

Rules of the Municipal Court.— The board of justices of this court, as provided by section 12, has adopted "Rules Relative to Clerks and Attendants," which will be found *in extenso* under said section.

Saturday.— By Laws 1887, chap. 185, p. 205, this court and the clerks' offices thereof may be closed on each Saturday at one o'clock in the afternoon, from the first day of July to the first day of October, both days included, in each year, provided such court is not engaged in the actual trial or hearing of actual proceedings.

Searching records; certificate of search; fees; penalty for neglect.— See § 961, Code Civ. Proc.

For fees of the county clerk, referred to in this section, see Code Civ. Proc., §§ 3301, 3304, and 3305.

Summary proceedings.— The duties of the clerk as respects summary proceedings are to be found in chapter 17, title 2, sections 2231 to 2265, of the Code of Civil Procedure, which supersedes all the former laws on the subject of summary proceedings in this court except the session laws enacted relating thereto, which were left unrepealed.

By section 2239 of said Code, the petition by which these proceedings are now commenced must be filed with, and the precept issued by, the clerk of the court; there are other provisions respecting the duties of the clerk, but, as already stated, it is not the province of this work to treat of "Summary Proceedings," and the practitioner must be referred to the sections of the Code of Civil Procedure, already mentioned, for information on this subject.

Summons.— The clerk must indorse upon the summons and upon the copy thereof, in an action where an execution may issue against the

person, a general reference to that fact in the following form: "Plaintiff claims defendant is liable to arrest and imprisonment in this case." See § 39.

§ 283. **To collect and account for fees, et cetera.**— It shall be the duty of the clerk in each district, to collect and receive all the fees, including the fees allowed by law in summary proceedings to recover lands, and to account for and pay the same into the city treasury monthly, under oath, on the first day of each and every month, or within three days thereafter, which account shall contain the title of each case and the amount of fees received therein, and the salary of such clerk shall not be paid until he shall have so accounted and paid, and he shall perform no service until he shall have received the legal fees therefor.

Notes to section 283.

This section is taken from section 1429 of the Consolidation Act (Laws 1882, chap. 410), which was the same as section 73, chapter 344, Laws 1857.

Fees; provisions of law as to.— See notes to § 282.

Id.; Tabulated statement of.— See the end of § 356.

§ 284. **Docket; what to contain.**— The clerk of the court in each district must keep a book, denominated a docket, in which must be entered by him:

1. The title of every action or proceeding, in which a summons or precept is issued.

2. The date of the summons or precept, and the time of its return, and if an order of arrest, warrant of attachment or writ of replevin was issued such facts must also be stated.

3. The time when the parties, or either of them appeared; a minute of their pleadings, if in writing, referring to them; if not in writing a concise statement of the pleadings.

4. Every adjournment, and to what time.

5. When a trial by jury is demanded, the demand must be stated, and by whom made, and the time appointed for the trial, and the return of the jury.

6. The names of the jury sworn.

7. The verdict of the jury and when received; if the jury disagree and are discharged, that fact must be stated.

8. The judgment of the court, its amount, and the costs in the action.

9. The issuing of execution, when issued, and to whom; the renewals thereof, if any, and when made; the return and when made, and a statement of money paid to or by the clerk, and when, and by or to whom.

10. The giving of a transcript to be filed in the county clerk's office, and when and to whom given.

11. The receipt of a notice of appeal or order to make or amend a return, stating the time of the receipt thereof, and the time of filing a return on appeal.

12. Any other order as the court may direct.

Notes to section 284.

This section is taken from section 1409 of the Consolidation Act (Laws 1882, chap. 410), which was the same as section 59, chapter 344, Laws 1857.

When judgment may be entered.— The clerk is a co-operative part of the court, performing its ministerial duties, while the functions of the justice are judicial. The entry or recording of the decision as a judgment, whether by a clerk, or by the entry of it by the justice in his docket, is, from its ministerial character, merely directory, and may be validly performed after the time fixed by the statute. *Dalton* v. *Loughlin*, 4 Abb. N. C. 188.

The clerk has no power to enter judgment even upon the verdict of a jury, except by the direction of the justice. The court must give the judgment. *De la Figanierre* v. *Jackson*, 4 E. D. Smith, 477.

§ 285. **Entries; how to be made.**—The several particulars in the last section specified must be entered under the title of the action or proceeding to which they relate, and at the time when they occur. Such entries in the docket, or a transcript thereof, certified by the clerk or his successor in office, with the seal of the court thereon impressed, are evidence to prove the facts as stated therein.

Note to section 285.

This section, together with sections 286, 287, 288, and 289, are taken from sections 1409, 1410, 1411, 1412, 1413, and 1414 of the Consolida-

tion Act (Laws 1882, chap. 410), which are the same as Laws 1857, chap. 344, §§ 59, 60, 61, 62, 63, and 64, with the exception of the word "deputy" changed to "assistant."

§ 286. **Index.**— The clerk must keep an index to his docket, in which must be entered the names of the parties to each summons or precept, with a reference to the page of entry; the names of the parties respectively, must be entered in the index in alphabetical order.

Note to section 286.

See note to § 285.

§ 287. **To be delivered by clerk to his successor.**— It is the duty of the clerk to deliver to his successor in office his official dockets and papers on file in his office, as well his own as those of his predecessors which may be in his custody, there to be kept as public records.

Note to section 287.

See note to § 285.

§ 288. **Successor may issue execution on former unsatisfied docket.**— A clerk with whom the docket of his predecessor is deposited, may issue execution on a judgment there entered and unsatisfied, in the same manner and with the same effect as though he was clerk of the court at the time the judgment was rendered.

Note to section 288.

See note to § 285.

§ 289. **Certified copies; prima facie evidence.**— A copy of a paper on file in the office of the clerk, certified by him or his assistant as such, shall be prima facie evidence thereof.

Note to section 289.

See note to § 285.

Note.— There are no sections from 289 to 293.

ARTICLE II.

Marshals.

SECTION 293. Marshal not to appear, et cetera.
294. Bond to be executed by.
295. Prosecution of bond.
296. In what court bond may be prosecuted.
297. Judgments against marshals; transcript and execution.
298. Entry of judgment to be endorsed on bond; how.
299. Amount collected to be credited on bond.
300. City clerk to report cancelled bonds to mayor; renewal of bond.
301. Appointment deemed waived for failure to file bond.
302. Process to be served by marshals.
303. Marshal may serve process within city limits.
304. Certain laws in relation to sheriffs made applicable.
305. Marshal to keep entry book and indorse, et cetera.
306. Removal and suspension of marshals.

Notes to article II.

Marshals.— The commissioners to revise and codify the laws relating to this court by chapter 218, Laws 1902, in their report to the Legislature, under the above contents, say. "Sections 1424, 1425, 1426, and 1427 of the Charter are not included in this act, but are preserved as Charter enactments."

These sections are as follows:

Marshals of the cities of New York and Brooklyn continued.

CHARTER, § 1424. The marshals in the city of New York as heretofore known and bounded, and the marshals and constables in the cities of Brooklyn and Long Island City, and in the several towns mentioned in section one of chapter one of this act, in office at the time this act shall take effect, shall continue to hold such offices and perform the duties thereof until midnight of the thirty-first day of January, eighteen hundred and ninety-eight, and said terms of office shall then expire, except those of the marshals in the late city of New York and the marshals in the late

city of Brooklyn who shall continue to be marshals of The City of New York, as hereby constituted, till the expiration of their respective terms.

Note to Charter section 1424.

The law relating to "City Marshals" was principally contained in chapter 20, title 1, sections 1699 to 1711, both inclusive, of the Consolidation Act (Laws 1882, chap. 410). The sections have all been repealed and sections 293 to 306 enacted in their place. This section takes the place of section 1699 of the Consolidation Act.

Mayor to appoint marshal; term of office.

CHARTER, § 1425. On or before the twentieth day of January, eighteen hundred and ninety-eight, the mayor of The City of New York shall appoint ten marshals in the manner provided in the next section, who shall hold their respective offices for six years; and there shall be appointed in like manner every sixth year thereafter the same number of marshals for the like terms. Any person appointed after the commencement of the term, as herein prescribed, shall hold only until the expiration of the term and until a successor is duly appointed and has qualified.

Notes to Charter section 1425.

This section supersedes the Consolidation Act, §§ 106 and 1699. See also § 1427, Charter.

Appointing power.— The power of appointment by the mayor under this section is an executive power of the State vested by the Constitution and law in him, and the judicial power can neither inquire into his motives in the exercise of this power, nor control him in such exercise. *People ex rel. Roosevelt* v. *Edson*, 52 N. Y. Super. (J. & S.) 53, revg. 51 N. Y. Super. (J. & S.) 238; s. c., 51 N. Y. Super. (J. & S.) 22.

Must be in writing.— No appointment to office can be made verbally except where permitted by the terms of the statute conferring the appointing power; in the absence of such permission, the appointment must be by commission, viz., a formal writing signed by the

official with whom the appointing power rests. *People ex rel. Babcock v. Murray*, 70 N. Y. 521, revg. 8 Hun, 577. See *People ex rel. Kressen v. Fitzsimmons*, 68 N. Y. 514.

Certificate of appointment.— By the Charter section 1547 every person appointed or elected shall record a certificate designating the terms for which said person has been appointed or elected.

Id.; marshals for the boroughs of Queens and Richmond.

CHARTER, § 1426. Six of said marshals so to be appointed shall be residents of the borough of Queens, and four residents of the borough of Richmond; and said marshals shall be assigned by the mayor to such duty within the boroughs wherein they reside respectively as is or may be provided by law.

Successors to present marshals of New York city.

CHARTER, § 1427. On the expiration of the terms of said marshals of the city of New York mentioned in the last clause of section fourteen hundred and twenty-four of this act, the said mayor shall appoint their successors for terms of six years respectively.

Notes to Charter section 1427.

This section supersedes section 1699 of the Consolidation Act (Laws 1882, chap. 410). See also § 1425 and notes.

Action by marshal.— He cannot serve a summons in his own action, where he is plaintiff. See *Smith* v. *Burlis*, 23 Misc. Rep. 544.

Appearance or acting on behalf of either or any party by a marshal in an action or proceeding is prohibited by section 293. And see § 63, Code Civ. Proc.

Arrest; duties of marshal.— See § 66.

Id.; Id.; execution on.— See §§ 266, 272.

Id.; dumping garbage into the waters of the port of New York.— See § 880, Charter.

Id.; order of, must be directed to marshal.— See § 56.

Id.; Id.; must be served by marshal.— See § 59.

Id.; marshal may require sureties in undertaking on, to justify.— See § 63.

Bond of a marshal.— § 293.

Bonds; prosecution of.— § 295.

Compensation of marshal are his lawful fees and necessary expenses for taking the property and keeping it "as taxed by the court out of which the proceeding issued." See § 104 of this act. Formerly, under section 1711 of the Consolidation Act (Laws 1882, chap. 410), the compensation was left to the discretion of the justice. See *Stewart* v. *Fidelity L. Assn.*, 19 Misc. Rep. 49.

Contempt; when guilty of.—*Dailey* v. *Fenton*, 47 App. Div. 418, 62 N. Y. Supp. (96 St. Rep.) 337.

Civil office; not to hold any other.— By the Charter section 1549 no appointive officer under the city government can hold any other civil office.

Definition of the word "Marshal."— See § 360, subd. 4.

Execution to marshal, its requisites; notice of sale, sale, and other provisions concerning marshals. See § 271 and notes.

For unpaid taxes. § 853, Consolidation Act. Revised in Charter, § 926.

Duties of marshal thereon. §§ 855 and 856. Revised in Charter, §§ 928 and 929.

On judgment in action wherein a warrant of attachment was had, how executed. § 91, this act.

Against marshal on judgment against him. §§ 270 and 297, this act.

Exempt property from levy and sale.— See §§ 1389 to 1404, Code Civ. Proc.

Fees of marshal.— See § 354, and Code Civ. Proc., § 339.

Id.; replevin.— See § 104; *Stewart* v. *Fidelity, etc.*, 19 Misc. Rep. 419.

Id.; tabulated.— See end of § 356.

Jury.— Marshal in charge of. See § 240.

Judgment against marshal. §§ 270 and 297, this act.

Liability of marshal to execution creditor.— See § 276 and notes. See also §§ 113, 114.

Being once relieved from liability, the court has no power to renew his liability. *Lewis* v. *Stevens*, 93 N. Y. 57.

Oath to marshal.— See notes to § 240.

Order of arrest must be directed to a marshal (§ 56, this act), and must be served by him. § 59, this act. Duties on executing. §§ 61, 62, 63, 64, and 65, this act.

Powers of.— See § 339, Code Civ. Proc.

Process must be served and executed by a marshal. §§ 55 and 303, this act. By the latter section, anywhere in the city of New York.

Removal of marshal by mayor.— § 306, this act.

Return of marshal shall be presumptive evidence in action against sureties. § 127, this act.

Summary proceedings.— Service of precept in § 36, this act.

Summons, service of. § 31, this act. *Alias* summons. § 30, this act.

Transcript of judgment against marshal.— §§ 270 and 297, this act.

Sale on execution, when and how conducted. See § 1384, Code Civ. Proc., and notes to § 271 of this act.

§ 293. **Marshal not to appear, et cetera.**— A marshal of the city of New York cannot appear or act on behalf of either or any party in an action or proceeding in said municipal court.

Note to section 293.

This section is taken from section 1369 of the Charter (Laws 1897, chap. 378, as amended in 1901).

§ 294. **Bond to be executed by.**— No marshal shall be permitted to enter upon the duties of the office until he shall execute a bond, with two sufficient sureties, who shall be residents of and shall own real estate within the city of New York, to the amount of double the penalty of the bond, to the city of New York, in the penal sum of two thousand dollars, jointly and severally to answer the city of New York, and any parties that may complain conditioned that such marshal shall well and faithfully execute the duties of said office of marshal, without fraud, deceit or oppression, such sureties to justify in double the amount of such bond. The said bond shall be delivered to the city clerk of the city of New York, who shall judge of and determine the competency of the sureties; and should he approve of the same, he shall note his approval thereon, and shall cause such bond to be filed in the office of the city clerk, forthwith after having been approved by him, and he shall either approve of or reject such bond within five days after the same shall have been presented to him for that purpose. Nothing in this act shall be construed to prevent a surety company authorized by law to act as surety.

Note to section 294.

This and sections 295 and 296 are taken and constructed from sections 1700, 1701, and 1702 of the Consolidation Act (Laws 1882, chap.

410) and from section 1428 of the Charter, the provisions of which latter section have been substantially followed in sections 294, 295, and 296. The bond of the marshal is increased from $1,000 to $2,000.

§ 295. **Prosecution of bond.**— Any person who shall be aggrieved by any official misconduct on the part of any marshal, and who may desire to prosecute his official bond, and who shall have first obtained judgment against such marshal for official misconduct, may move before a justice of the supreme court at special term, in the judicial department, wherein the borough for which such marshal shall have been appointed, is situated, after giving such marshal and his sureties eight days previous notice of intention so to do, by personal service of said notice on them, stating when such motion will be made and of the papers to be used on such motion, for leave to prosecute such official bond in his own name, and such leave shall be granted upon it appearing satisfactorily to said court:

1. That a judgment has been obtained in his favor against such marshal for official misconduct, specifying the time when and the court whereby such judgment was rendered, and the amount thereof.

2. That such transcript of judgment has been filed against such marshal in the office of the clerk of the county, within which the borough for which said marshal shall have been appointed, is situate; specifying the time when such transcript was filed and execution issued, and that the sheriff of that county has returned said execution, wholly or partly unsatisfied, after having demanded payment thereof of such marshal; and his neglect or refusal to pay the same, and if any payments have been made on such execution, specifying the amount thereof, but where such marshal shall have died or removed from the city of New York, a demand for the payment of the amount of such execution shall not be necessary.

3. That such judgment is wholly or partly unpaid, specifying the amount uncollected or unpaid, and that the sureties or surety, have or has been served, with the notice and papers hereinbefore mentioned.

Notes to section 295.

See notes to § 294. See § 1, subd. 5, as to action upon the bond in this court.

Liability of marshal to execution creditor.— See § 276 and notes.

Liability of sureties; exempt property.— The sureties are liable for the value of exempt property seized by a marshal. *Griebe* v. *Northrup*, 66 App. Div. 86.

Id.; failure of marshal to make return.— In an action against a constable and his sureties it is proper to join claims that he took sufficient goods on plaintiff's execution to satisfy it; that he has failed to make return and keeps and detains the money. *Moore* v. *Smith*, 10 How. 361.

The surety of a marshal upon his official bond is liable in damages for the marshal's neglect to return an execution within the time required by statute. *Carpenter* v. *Doody*, 1 Hilt. 465. The condition of the bond, that he "shall in all things well and faithfully perform and execute the duties of marshal without fraud, deceit, or oppression," requires two things: *First*, that he shall perform the duties of his office; *second*, that he shall do so without fraud, deceit, or oppression. And, in the action upon the bond for the official neglect, *e. g.*, to return an execution within the requisite time, it is not necessary to show fraud, deceit, or oppression. 6 Wend. 456. In such an action, a judgment, previously recovered against the marshal for the same neglect, is *prima facie* evidence of the amount for which the surety is liable. *Carpenter* v. *Doody*, 1 Hilt. 465.

Id.; stranger; taking property of.— In an action against the sureties where the alleged breach of the bond is misconduct of the marshal, in levying upon the goods of one person under an execution against another, the judgment in an action by the party whose goods were taken against the marshal for the unlawful taking may be given in evidence, although the record does not show that the judgment was recovered against him as marshal, or for misconduct in his office. Such evidence is material to prove the act of taking, and parol evidence *dehors* the record may be given to show the grounds of the judgment, and that the act was done *colore officii*. *Mayor, etc.*, v. *Ryan*, 7 Daly, 436. To the contrary, see *Berry* v. *Schad*, 50 App. Div. 132.

Id.; valid judgment.— The sureties on a marshal's bond are not liable until after a valid judgment has been recovered against their principal. *In re Braiser*, 2 How. Pr. N. S. 154.

Not liable for indemnity money paid to marshal.— A surety upon the official bond of a marshal, conditioned that if the said marshal "shall well and faithfully execute the duties of said office of marshal without fraud, deceit, or oppression, the above obligation shall be void; otherwise shall remain in full force and virtue," is not liable thereunder for the failure of the marshal to return to the plaintiff in an

execution a sum of money deposited by the latter with the marshal as security against any damages which the marshal might sustain by reason of a levy made by him under the execution, pursuant to a contract between the marshal and the plaintiff. *De Sisto* v. *Stimmel*, 58 App. Div. 486.

§ 296. **In what court bond may be prosecuted.**— A justice referred to in the preceding section, may order such bond to be prosecuted in the municipal court of the city of New York, or in the city court of the city of New York, if such borough be within the county of New York, or in the county court of the county wherein such borough is situated, if in any other county. Either of said courts shall have jurisdiction in actions brought on such bond, upon such leave being granted, and the said justice upon said motion may award the aggrieved party his reasonable costs on such motion, not exceeding the sum of ten dollars, which shall be included in the judgment obtained upon such bond.

Notes to section 296.

This section is taken from section 1702 of the Consolidation Act (Laws 1882, chap. 410), and section 1428 of the Charter of 1897, as amended in 1901.

See notes to § 294.

"Jurisdiction," in such action in this court. See § 1, subd. 5. See also *Moog* v. *Keogh*, 4 N. Y. St. Rep. 539; s. c., 42 Hun, 494.

§ 297. **Judgments against marshals; transcript and execution.** — Whenever any judgment shall be rendered against any marshal or his sureties or surety in any court as provided in the foregoing section, a transcript thereof shall be filed with the county clerk in the county wherein the judgment is so obtained, and from the filing of such transcript the provisions of section two hundred and seventy of this act apply.

Notes to section 297.

This section is taken from section 1703 of the Consolidation Act (Laws 1882, chap. 410), which is similar to section 1398 of the Consolidation Act. The names of the "Marine Court" and "District Courts" have been omitted. The name of the former was changed to "City Court of New York" by Laws 1883, chap. 26, and the latter

court was abolished by section 1350 of the Charter (Laws 1897, chap. 378).

The filing of a transcript in the office of the clerk of the Court of Common Pleas has also been omitted. Said court was abolished since January 1, 1896, by the Constitution of 1894, article 6, section 5.

Judgment against marshal.— See § 270.

Return of execution and satisfaction.— See § 277.

§ 298. **Entry of judgment to be endorsed on bond; how.**— The clerk of the county wherein said judgment is entered shall issue a transcript upon application of the judgment creditor, stating the amount of the judgment and that the sum is a charge against the bond of the marshal. The transcript may be filed with the city clerk in the office wherein the bond of said marshal is filed, and the city clerk shall make a memorandum on the official bond of every marshal, upon the filing of every transcript, of a judgment obtained against him and his sureties, and of the time when and the court whereby such judgment was rendered, and the amount thereof, and shall be entitled to a fee of fifty cents therefor, which the court rendering judgment shall have power to include in such judgment, together with whatever other disbursements are or may be necessarily incurred in said action, and the said bond shall be cancelled to the amount of such judgment.

Notes to section 298.

This section is taken from section 1704 of the Consolidation Act (Laws 1882, chap. 410).

Transcript.— By this section a transcript of a judgment against a marshal may be filed with the "city clerk."

§ 299. **Amount collected to be credited on bond.**— Whenever any action shall be commenced against the sureties of any marshal, and such sureties shall pay the amount for which such suit is brought, and the costs and disbursements incurred therein, or any part thereof, the party or parties so paying shall be entitled to have such sum so paid credited upon such bond, upon presenting the certificate of the plaintiff or his attorney in such action, acknowledging such pay-

ments to such clerk aforesaid, and upon such clerk endorsing such payment on such bond, it shall be cancelled to the amount so paid.

Note to section 299.

This section is the same as section 1705 of the Consolidation Act (Laws 1882, chap. 410).

§ 300. **City clerk to report cancelled bonds to mayor; renewal of bond.**— Whenever judgment shall be rendered against the official bond of any marshal, sufficient or partially sufficient to cancel the same, the city clerk aforesaid, shall report to the mayor the fact, and it shall be the duty of the mayor to compel such marshal to renew his official bond, if the same be cancelled in whole, or to furnish an additional bond, for the amount of the cancellation in the penal sum of double such amount, if said bond be cancelled in part, and should said marshal neglect, refuse, or fail so to do, within ten days after being notified, he shall be removed by the mayor aforesaid, or suspended from performing the duties of the office until such time as he shall renew the same, and such bond shall be renewed in the same manner as often as the same shall be cancelled.

Note to section 300.

This section is taken from section 1707 of the Consolidation Act (Laws 1882, chap. 410).

§ 301. **Appointment deemed waived for failure to file bond.**— Every marshal shall, within thirty days after his appointment, enter into a bond in the manner provided in this act, or he shall be deemed to have waived his appointment as such marshal, and some other suitable and proper person shall be appointed in his place and stead to discharge the duties appertaining to such office of marshal.

Note to section 301.

This section is taken from section 1708 of the Consolidation Act (Laws 1882, chap. 410).

§ 302. **Process to be served by marshals.**— Every summons, precept, order of arrest, attachment, writ of replevin, or

other process issued by or out of the municipal court, and every summons or precept issued by the clerk of the court in any district, and every summons issued by any justice thereof, shall be served and executed by a marshal, except as prescribed in section thirty-six of this act; but no person other than a marshal shall be entitled to any fees or other compensation therefor, except the persons who serve process for the corporation counsel.

Notes to section 302.

This section is taken from section 1709 of the Consolidation Act (Laws 1882, chap. 410), which is the same as Laws 1879, chap. 102.

This section specifies, "and every summons issued by any justice thereof." The justice does not issue the summons in this court, the clerk of the court issues the summons. See § 27.

The same error is contained in section 1709 of the Consolidation Act, although by section 1297 of the Consolidation Act, the clerk of the court issued the summons. Attention to this was called in the *Fourth Edition* of this work, on page 444.

Process to be served by marshal.— Service of an order of arrest, warrant of attachment, or requisition to replevy. See § 55 and notes.

Who may serve the summons.— See § 36 and notes.

Papers to be delivered to arrested person.— See § 59.

How warrant of attachment to be executed.— See § 77 and notes.

Service of summons and warrant on defendant.— See § 83 and notes.

Copy of process to be delivered when served.— See § 101, Code Civ. Proc.

Execution of process; punishment for violation; may return by mail. — See § 102, Code Civ. Proc.

§ 303. **Marshal may serve process within city limits.**— A marshal of the city of New York may, and is empowered, and has the authority to serve or execute all process and mandates of the municipal court of the city of New York, in any part of the city of New York, notwithstanding he was appointed for or is a resident in, a particular borough.

Notes to section 303.

This section is new, and removes any doubt as to the service, or execution by a marshal of "all process and mandates" in *any part* of the city of New York, as now constituted, viz.: Four counties and

five boroughs, under the Charter (Laws 1897, chap. 378), as amended by Laws 1901, chap. 466. See also § 304.

Process to be served by marshal.— See §§ 55 and 302.

Mandate is defined by § 3343, subd. 2, Code Civ. Proc.

§ 304. **Certain laws in relation to sheriffs made applicable.**— All provisions of law in relation to the taking and restitution of property by sheriffs of counties shall apply to the taking and restitution of property by the said marshals, except that a marshal is not restricted in the performance of his duty as such, to the territorial limits of a county, when engaged in the service or execution of process or mandates, but is authorized to act within the limits of the city of New York.

Notes to section 304.

This section is taken from section 1711 of the Consolidation Act (Laws 1882, chap. 410). The addition, after the word "marshals," is new.

These "provisions of law" are to be found mainly in the Code of Civil Procedure, the Charter, and in the Session Laws. The following are deemed of sufficient importance for insertion here. See also notes to § 302.

Attachment.— Warrant of, must be served and executed by a marshal. § 55, this act.

Duties on execution of warrant. See §§ 77 to 91, inclusive, this act.

Return on execution, and duties thereunder. §§ 88, this act.

Execution on judgment where property has been attached. § 91, this act.

Marshal to approve sureties on undertakings by defendant on warrant of attachment. § 84, this act.

Fees of marshals.— See §§ 354 and 356, where, under notes to the latter section, the fees of the marshal, are tabulated.

Id.; and necessary expenses of marshal in replevin.— See § 104; and see *Stewart* v. *Fidelity Loan Co.*, 19 Misc. Rep. 49.

Id.— No officer of the city government except city marshals shall receive fees to their own use. § 56 of the Consolidation Act, revised by Charter, § 1550. See § 354, this act.

Levy.— Where a sheriff has notice that goods levied upon by him while in the possession of a third person consist partly of goods claimed by the latter, under a chattel mortgage, from the judgment debtor, and partly of goods purchased from another, it is his duty, if he wishes to make any distinction in his sale between the two classes, to ask the person in possession to point them out so that they can be distinguished from each other. *Sharp* v. *Lamy*, 37 App. Div. 136.

Liability to execution creditor.— See § 276, and notes.

Mandate defined.— See § 3343, subd. 2, Code Civ. Proc.

Id.; direction and execution of.— See § 339, Code Civ. Proc.

Id.; when execution of, is resisted, sheriff to act.— See § 3158, Code Civ. Proc.

Oysters around the waters of Harlem river; fines and penalties; seizure and return by marshal.— See §§ 767, 768, 769 of the Consolidation Act, which remain in force until changed by board of aldermen.

Rent, liability for.— Where a sheriff had levied upon a tenant's property, refused to quit in obedience to a warrant of dispossession in summary proceedings, saying that the landlord would get his pay, and continued in possession after service of a notice that if he did so, the landlord would hold him liable for use and occupation at a specified rental,—*Held*, that these facts warranted a finding that the relation of landlord and tenant existed, and that the sheriff was liable for the rent. *Gregg* v. *Tamsen*, 42 App. Div. 148.

Replevin; chattel.— Requisition to replevy. § 100, this act.

Execution of same. § 102, this act.

Return to requisition. § 105, this act.

Exception to sureties may be served on marshal. § 106, this act.

Penalty for wrong delivery by marshal. § 112, this act.

Claim of title by third person. § 113, this act.

Action on the undertaking. § 126, this act.

How taken from a building.— See §§ 1701 and 1702, Code Civ. Proc., and notes under § 103 of this act.

§ 305. **Marshal to keep entry book and indorse, et cetera.**— Every marshal shall keep a book in which he shall enter immediately upon the receipt thereof all the process and mandates of the court delivered to him for execution, and his disposition thereof; and he shall also endorse upon such process or mandate the date and the hour of receiving the same.

Notes to section 305.

This section is new. No punishment or penalty is prescribed in this section, if the marshal does not obey or conform to its provisions. We suppose the next section is applicable.

Mandate is defined by § 3343, subd. 2, Code Civ. Proc.

§ 306. **Removal and suspension of marshals.**— The mayor may remove any marshal, after giving him an opportunity to be heard, upon charges in writing preferred against such

marshal, and filed with the mayor, and may, in his discretion, suspend said marshal from the performance of his duties, as such, pending a hearing upon the charges. Upon charges being preferred against a marshal by a justice of the municipal court, the mayor may forthwith cause notice of suspension of such marshal to be served upon him, and such marshal shall thereupon remain suspended until the hearing and determination of such charges by the mayor.

Note to section 306.

This section is taken from section 1429 of the Charter (Laws 1897, chap. 378), which superseded section 1706 of the Consolidation Act (Laws 1882, chap. 410).

NOTE.— There are no sections from section 306 to 310.

TITLE IX.

Appeals.

SECTION 310. When appeal may be taken.
311. When and how taken.
312. Service of notice upon respondent.
313. Omission to serve one, how supplied; amendment when allowed.
314. Undertaking to stay execution upon judgment.
315. Exception to sureties; justification.
316. Proceedings how stayed.
317. Return.
318. Settlement of case on appeal.
319. When justice is dead, et cetera.
320. Appeal when adverse party has died.
321. Proceedings when party dies pending appeal.
322. Order of substitution.
323. Restitution upon reversal.
324. Setting off costs and recovery.
325. Hearing on appeal, dismissal thereof; reversal on stipulation.
326. Judgment.
327. Clerk appellate court to return papers.

§ 310. **When appeal may be taken.**— An appeal from a judgment rendered in an action, or a final order made in summary proceedings in the municipal court of the city of

New York, or from orders as hereinbefore provided, may be taken to the supreme court. Such appeal shall be heard in such manner and by such justice or justices as the appellate division of the supreme court in the judicial department, embracing the district wherein the action is brought shall direct, except that the appellate division of the second judicial department may direct that such appeal may be heard directly before that court. The appellate court may reverse, affirm or modify the judgment, order or final order appealed from, and where a judgment, order or final order is reversed, may order a new trial, in the municipal court in the district in which the action is brought. Where a judgment, order or final order is modified or a new trial is ordered, costs shall be in the discretion of the appellate court.

Notes to section 310.

This section is taken from the first subdivision of section 1367 of the Charter (Laws 1897, chap. 378, as amended by Laws 1901, chap. 466), which made articles I and II of title VIII, chapter 19, sections 3044 to 3062 of the Code of Civil Procedure applicable to this court, out of which sections 310 to 328 of the present act have been constructed. Section 1367 Consolidation Act was entitled "Appeals;" this section is entitled "When appeal may be taken," but many other subjects are included, such as *how and where* the appeal shall be heard, the "*disposition*" the appellate court may make of the appeal, in what cases *costs* are in the *discretion* of the court. These provisions were contained in the former section. The title given to this section as to these provisions is misleading. The provision as to the stenographer's minutes in the former section have been omitted in this one, and are now to be found in section 353. "The orders as herein provided," referred to in this section, will be found in sections 254 to 258. Section 253 is excluded from these sections by the provisions contained in section 257.

Section 253 is entitled "Court may open default."

Section 254 is entitled "Motions to set aside a verdict or vacate or amend a judgment."

Section 255 is entitled "New trial; fraud or newly-discovered evidence." This section provides that from such an order the appeal shall lie as *from a judgment* of this court.

Section 256 is entitled "Court may impose conditions upon opening *a default, et cetera*," which includes vacating, amending, modifying, or setting aside a judgment.

Section 257 is not entitled nor is it mentioned in the contents of article I. It prohibits an appeal *in the first instance* from an order

opening a default and vacating a judgment entered thereon. There is therefore no appeal from such an order *in the first instance*, that is from the order itself, and we take it that the party aggrieved must appeal from the *judgment* in order to have the order reviewed. See *Beebe* v. *Nassau S. C. Co.*, 41 App. Div. 456, 58 N. Y. Supp. 769. See also § 326, "Judgment," wherein the power of the court on appeal is again expressed and amplified. It may affirm or reverse in whole or in part, as to any or all parties, for errors of fact or law, and order a new trial where the judgment is contrary to or against the weight of evidence.

Amount, correcting, modifying, and reversing judgment as to.— Where the judgment is for too large a sum, and there is a particular amount which ought to be deducted, the court may reverse the judgment for so much as ought to have been deducted, and affirm it as to the residue. *Harris* v. *Bernard*, 4 E. D. Smith, 195; *Donohue* v. *Henry*, 4 E. D. Smith, 162, 165; *La Motte* v. *Archer*, 4 E. D. Smith, 46; *Shannon* v. *Burr*, 1 Hilt. 39.

Where a justice errs in rendering judgment for too large a sum, it is not necessary that the appellate court should reverse the judgment absolutely. It may be reversed, unless the plaintiff remits the excess. 6 N. Y. 97, 104; *Weed* v. *Lee*, 50 Barb. 354.

The court on appeal has power to modify the judgment by eliminating therefrom all provisions other than that plaintiff was entitled to the amount found due him. *Egan* v. *Laemmle*, 5 Misc. Rep. 224.

Id.; increasing recovery.—The power of the Appellate Term to modify a judgment of this court may be exercised to increase the amount of the recovery, where the record presents all the necessary facts upon which a final judgment depends, and discloses no errors of law. *Ayvard* v. *Powers*, 25 Misc. Rep. 476, 54 N. Y. Supp. 984.

Bronx borough, first district.— The portion of Westchester county annexed to the city and county of New York by chapter 934, Laws 1895, and which is now embraced within the first district of the borough of The Bronx, still remains part of the second judicial department, and an appeal from that court may be brought directly before the Appellate Division of the Second Judicial Department. *McTurck* v. *Foussadier*, 51 App. Div. 218; s. c., 64 N. Y. Supp. 962. See also *Duckworth* v. *Cunningham*, 26 Misc. Rep. 403; s. c., 56 N. Y. Supp. 191.

Brooklyn, borough of.— Though an appeal may be taken either to the Special Term of the Supreme Court or to the Appellate Division, if the appeal is taken to the Special Term no further appeal to the Appellate Division lies. *Manheim* v. *Seitz*, 36 App. Div. 352, 55 N. Y. Supp. 321.

Construction of statute.— The right of appeal always to be liberally construed: any construction that will work a forfeiture of that right

is not to be favored. *Ackerman* v. *Emott*, 4 Barb. 626; s. c., 3 N. Y. Leg. Obs. 337, 1 Wend. 388, 395.

In reviewing proceedings, it is the province of the court to give them, and all the acts of the parties upon trial, a fair and reasonable construction, such as it may be supposed was intended by the parties, or understood by the court, and so as to save, and not destroy, the rights of the parties. The same precision is not to be looked for either in offers of, or objection to evidence, nor the same care in noting them, that may be expected upon trials in a court of record or on a formal bill of exceptions. *Wilson* v. *Elwood*, 28 N. Y. 117.

Cross-appeal.— Both parties may appeal from the same judgment. *Glassner* v. *Wheaton*, 2 E. D. Smith, 352; *Beach* v. *Raymond*, 2 E. D. Smith, 406; *Robbins* v. *Codman*, 4 E. D. Smith, 316; *Jones* v. *Owen*, 5 Hun, 399.

The respondent must also appeal to take advantage of any error. When this is not done and the return clearly shows that no error was committed, it will furnish no ground for reversal. *Robbins* v. *Codman*, 4 E. D. Smith, 316; *Lee* v. *Schmidt*, 13 Abb. 183; s. c., 1 Hilt. 537; *Glassner* v. *Wheaton*, 2 E. D. Smith, 352; *Berrian* v. *Elmstead*, 4 E. D. Smith, 279.

The respondent can have no relief on appeal taken by the other party. On an appeal taken by one party, the other can have no relief. *Glassner* v. *Wheaton, supra; Beach* v. *Raymond, supra; Rooney* v. *Second Avenue R. R. Co.*, 18 N. Y. 368.

Costs on appeal to be taxed by clerk. See § 341.

Default; judgment.— An appeal lies from a judgment entered upon a default. *Spiero* v. *The Metropolitan St. Ry. Co.*, 14 Misc. Rep. 21. See *Allison* v. *The T. A. Snider P. Co.*, 20 Misc. Rep. 367; *Szerlip* v. *Baier*, 21 Misc. Rep. 692.

A judgment by default or affirming a judgment by default is not appealable, because it does not affect a substantial right. *Keller* v. *Feldman*, 29 Abb. N. C. 26; s. c., 49 N. Y. St. Rep. 718; *Jacobs* v. *Zeltner*, 9 Misc. Rep. 455; *Tooker* v. *Booth*, 7 Misc. Rep. 421.

Order, appeal from opening.— By section 257 no appeal from the order is allowed in the *first instance;* it seems it must be taken from the judgment. See notes to § 257, and notes to this section above.

Id.; denying a motion to open default.— The order is not appealable. The remedy is by appeal from the judgment. *Beebe* v. *Nassau S. C. Co.*, 41 App. Div. 456, 58 N. Y. Supp. 769.

Id.; abuse of discretion.— Where the refusal to open a default is an abuse of discretion the order is appealable. *Keller* v. *Feldmann*, 29 Abb. N. C. 426; s. c., 49 N. Y. St. Rep. 718.

Discretion is defined in *O'Connor* v. *Moscowitz*, 48 How. 451.

Judgment in one's own favor.— A party may have a judgment in his own favor reversed, when he has recovered a less sum than the evi-

dence shows he is entitled to. *Slaman* v. *Buckley*, 29 Barb. 290; *Bissell* v. *Marshall*, 6 Johns. 100.

Jurisdictional defects.— An appeal may be taken from jurisdictional defects as well as those of irregularity. Although a party is at liberty to treat a judgment or proceeding as void for want of jurisdiction, he may also seek a reversal by appeal. *Fitch* v. *Devlin*, 15 Barb. 47. See also 6 Wend. 654. But see *Hubbard* v. *Chapin*, 28 How. 407.

Id.; appeal not waived.—Defendant does not waive his right to appeal on the ground of lack of jurisdiction, by appearing at the trial and introducing evidence after the ruling of the justice retaining the cause. *Leverson* v. *Zimmerman*, 31 Misc. Rep. 642, 64 N. Y. Supp. 723.

Manner of hearing appeals by the Appellate Term as directed by the Appellate Division in the First Judicial Department.— By authority of the Constitution of 1894, article V, section 6, and in accordance with section 3213 of the Code of Civil Procedure, the justices of the Appellate Division of the Supreme Court (First Judicial Department), boroughs of Manhattan and The Bronx, directed that appeals from the Municipal Court of the city of New York in districts in the county of New York shall be heard at the county courthouse, borough of Manhattan.

Manner of hearing appeals as directed by the Appellate Division in the Second Judicial Department.— By the same authority, the justices of the Appellate Division (Second Judicial Department), directed that appeals from the Municipal Court in that department shall be heard at the county courthouse in the city of Brooklyn, county of Kings, borough of Brooklyn.

Rules of the Appellate Division of the foregoing respective judicial departments will be found on pages 434, 435.

Mechanic's lien actions, appeal in.— See Code Civ. Proc., § 3409. In such action an objection may be removed on an appeal by a modification of the judgment for which the court has ample authority. *Eagan* v. *Lacommle*, 5 Misc. Rep. 224.

Orders, appeals from, are allowed by section 257 as provided in sections 253 to 257, except that an appeal from an order "*opening*" a default is not permitted in the first instance, and it seems must be from the judgment. See notes to § 257, and notes to this section above. And see *Beebe* v. *Nassau S. C. Co.*, 41 App. Div. 456, 58 N. Y. Supp. 769.

Id.; discontinuance.— Where the summons in an action demands but $49, a successful defendant can recover nothing but disbursements; and where there is no proof that he has incurred any, he is not injured by an order discontinuing the action without costs, and therefore he has no grounds for an appeal from the order. *Miller* v. *Fiss et al.*, 21 Misc. Rep. 66.

Id.— Granting or denying motion for new trial on the ground of *fraud or newly-discovered evidence* is appealable as if from a judgment by section 255.

Offer to allow judgment.— As to the effect of an offer in the court below after a removal on appeal, see *Mock* v. *Saile*, 52 Hun, 198, 23 N. Y. St. Rep. 307, 17 Civ. Proc. Rep. 121.

Payment of judgment does not prejudice an appeal, if paid simply in submission to the mandate of the court, and not by way of compromise or agreement not to appeal. *Hardware, etc.* v. *Young*, 27 Misc. Rep. 226, 57 N. Y. Supp. 753.

Several claims.— Where two or more independent causes of action or items of claim are in court, and the judgment is right as to one and erroneous as to the others, and this appears on appeal, it is the duty of the court to reverse as to the erroneous and affirm as to the legal part of the judgment. 8 How. Pr. 377; *Staats* v. *Hudson River R. R. Co.*, 39 Barb. 298; s. c., 23 How. Pr. 463; *Decker* v. *Hassel*, 26 How. Pr. 528.

Second Judicial Department may direct that appeal be heard directly before the Appellate Division in that department. § 310. See also *Manheim* v. *Seitz*, 36 App. Div. 352, 55 N. Y. Supp. 321.

Summons not personally served, and defendant not appearing, he is allowed to appeal within twenty days after personal service upon him of written notice of entry of judgment. See § 311, and by § 253, the "Court may open default."

§ 311. **When and how taken.**— An appeal must be taken, within twenty days after the entry of the judgment, order or final order in the docket; except that where a defendant appeals from a judgment rendered in an action, wherein he did not appear, and the summons was not personally served upon him, the appeal may be taken within twenty days after personal service upon him, on the part of the plaintiff, of written notice of the entry of the judgment. An appeal is taken by serving upon the clerk of the court or his successor in office, in the district in which the judgment, order or final order was rendered, and upon the respondent, a written notice of appeal, subscribed either by the appellant or by his attorney in the appellate court.

Notes to section 311.

This section is taken from, and is substantially the same as sections 3046 and 3047 of the Consolidation Act (Laws 1882, chap. 410), relating to justices' courts, with the exception of the provisions as to orders, the omission of five years to appeal, subscription of the notice of appeal, and the provision that the notice of appeal must be served upon the clerk of the court, and not upon the justice as was done heretofore.

The provision in section 3047, as to payment of the costs of the action

included in the judgment, has been omitted. In section 317 it is *assumed* that it is not omitted, for that section provides that within thirty days after service of the notice of appeal "and the payment of the '*cost*' and fees *as prescribed in this act*" the clerk of the court must make a return, but there is no provision "prescribed in this act" for the payment of the "cost" or costs.

Section 347, subdivision 3, entitled, "*Fees payable to clerks*," provides that, "For a return on appeal from a judgment or order two dollars shall be paid to the clerk as court fees," and that is the only provision to be found prescribed in this act to comply with section 317.

Amendment, when allowed.— See § 313.

Appeal not in time.— If the appeal was not taken in time, there is no appeal pending, and nothing for the appellate court to dismiss. *Raymond* v. *Richmond*, 76 N. Y. 106; *Benedict, etc.* v. *Thayer*, 82 N. Y. 610; *Carling* v. *Purcell*, 3 Misc. Rep. 55.

Expiration of time.— The court has no authority to allow an appeal after the time has expired. *People* v. *Eldridge*, 7 How. 108.

Extension of time to appeal.— The court has no power to extend the time. *Thorn* v. *Roods*, 47 Hun, 435.

The time may be extended by stipulation between the parties. *Bagley* v. *Jennings*, 33 N. Y. St. Rep. 356, 58 Hun, 57, 19 Civ. Proc. Rep. 199.

Irregularity of notice of appeal must be taken advantage of by motion to dismiss the appeal. It will not be considered on the argument. *Nye* v. *Ayres*, 1 E. D. Smith, 532; *Partridge* v. *Thayer*, 2 Sandf. 227. And so when the notice of appeal is not served in time. *Mills* v. *Shult*, 2 E. D. Smith, 139. See § 313, "Omission to serve one; how supplied; amendment, when allowed."

Judgment must be appealed from in the notice of appeal, not the "decision" of the justice. *Starr* v. *Silverman*, 25 Misc. Rep. 184, 55 N. Y. Supp. 611.

Notice of, when sufficient.— Notice of appeal, to the effect that the plaintiff "appeals to the Appellate Division of the Supreme Court of the State of New York, First Judicial District,"—*Held*, sufficient to apprise defendant and to entitle the appeal to be heard by the Appellate Term, an amendment being granted. *Clapp* v. *Sternglanz*, 23 Misc. Rep. 641, 52 N. Y. Supp. 156.

Notice of appeal from this court "to the Supreme Court of the State of New York," is sufficient. *Morris* v. *Hunken*, 40 App. Div. 129, 57 N. Y. Supp. 712.

Though under the Charter of New York of 1897, an appeal may be taken to either the Special Term of the Supreme Court or the Appellate Division, from a judgment of the Municipal Court in the borough of Brooklyn, if the appeal is taken to the Special Term, no further appeal to the Appellate Division lies. *Manheim* v. *Seitz*, 26 App. Div. 352, 55 N. Y. Supp. 321.

Id.; when not sufficient.— Notice of appeal from the decision of a justice of this court, denying defendant's motion to dismiss the complaint for a direction of a verdict and for a judgment for defendant on his counterclaim,—*Held* to bring up nothing for review, the judgment not being appealed from. *Starr* v. *Silverman*, 25 Misc. Rep. 784, 55 N. Y. Supp. 611.

Omission to serve one; how supplied; amendment, when allowed.— See § 313.

Id.; default; summons not personally served.— Section 253 allows the court to open a "default;" strictly there can be no "default" on the part of a defendant when he has not been served; his remedy is by appeal, as expressed in this section.

That a judgment entered by default is not appealable and that a party must seek relief by motion to the court where the action was commenced, see *Briggs* v. *Bergen*, 23 N. Y. 162; *Otis* v. *Spencer*, 16 N. Y. 610; s. c., 15 How. Pr. 425; *Thurber* v. *Townsend*, 22 N. Y. 517; *Perkins* v. *Farnham*, 10 How. Pr. 120; *Maltby* v. *Crane*, 1 Keyes, 548.

Notwithstanding the power possessed by this court to open defaults and vacate judgments, an appeal lies to the Appellate Term from a judgment by default where there was no personal service of process. *Allison* v. *The T. A. Snider P. Co.*, 20 Misc. Rep. 367; *Szerlip* v. *Baier*, 21 Misc. Rep. 692. See § 3046, Code Civ. Proc., and notes; *Burkhard* v. *Smith*, 19 Misc. Rep. 31; *Tracy* v. *Shannon*, 22 Abb. N. C. 136. See also *Edel* v. *McCone*, 16 Daly, 216.

Id.; judgment taken by default, opening a, appeal from.— The Appellate Term may in the first instance determine, upon the opposing affidavits, the question of opening a judgment taken by default against a defendant who claims he was not served with the summons and will reverse the judgment if satisfied on the merits; and defendant is not prejudiced by having paid the judgment simply in submission to the mandate of the court and not by way of compromise, or an agreement not to appeal. *Empire, etc.* v. *Young*, 27 Misc. Rep. 226, 57 N. Y. Supp. 753.

An appeal lies from a judgment taken by default against defendant never served with summons, under Code Civ. Proc., § 3057, authorizing appeals from judgments rendered upon default, where the appeal is taken for error of fact. *Iron Clad Mfg. Co.* v. *Benjamin E. Smith & Sons*, 28 Misc. Rep. 172, 59 N. Y. Supp. 332.

Id.; order, no appeal from.— An appeal does not lie to the Appellate Term from an order of this court vacating a judgment against defendant for want of service of summons or appearance, nor from an order vacating a former order and denying the motion therefor. *Adolph* v. *Klein*, 23 Misc. Rep. 700, 52 N. Y. Supp. 32.

It seems that defendant might, in such case, obtain relief by appeal from the judgment under Code Civ. Proc., § 3057.

Time for appeal.— The time begins to run from the time the judgment is actually entered, and not from the date of the decision upon which it was entered. *Fuchs* v. *Pullman*, 2 Daly, 210. And see *Buerlin* v. *Hodges*, 19 Civ. Proc. Rep. 107; *Dorsey* v. *Pike*, 13 Civ. Proc. Rep. 147, 46 Hun, 112, 11 N. Y. St. Rep. 227; *Young* v. *Whitcomb*, 46 Barb. 615; *Jennings* v. *Miller*, 10 Misc. Rep. 762; *Keller* v. *Strauss*, 34 Misc. Rep. 194; s. c., 68 N. Y. Supp. 777.

If the appeal was not taken within the time prescribed by statute the notice of appeal served is a nullity. *Clapp* v. *Hawley*, 99 N. Y. 610.

Judgment was rendered after a trial, but was set aside by the justice on motion within twenty days thereafter and a new trial ordered, but such judgment was subsequently vacated. *Held*, that the order setting aside the judgment was a nullity, and that the time to appeal ran from the entry of the judgment. *Zimmerman* v. *Black*, 12 Misc. Rep. 158.

The day on which judgment is rendered is to be excluded, and also Sunday when that is the last day. *Dorsey* v. *Pike*, 13 Civ. Proc. Rep. 147, 46 Hun, 112, 11 N. Y. St. Rep. 227.

A notice of appeal required to be given within thirty days served on June 27th, appealing from an order of May 27th, was in time. *Gallt* v. *Finch*, 24 How. 193.

§ 312. **Service of notice upon respondent.**— Service of the notice of appeal upon the respondent may be made, by delivering it in any part of the state, to the respondent personally, or in one of the following methods.

1. If the respondent is a resident of the city of New York, by leaving it at his residence, with a person of suitable age and discretion. If he is not a resident of the city of New York, and the person who appeared as his attorney upon the trial is a resident thereof, it may be served upon the attorney, either personally, or by leaving it at his office or residence, with a person of suitable age and discretion.

2. If service within the city of New York cannot be made, with due diligence, upon the respondent personally, or in the method prescribed in the foregoing subdivision, the notice of appeal may be served upon him, by delivering it to the clerk of the court in which the judgment was rendered, addressed to the respondent.

Notes to section 312.

This section is the same as section 3048 of the Code of Civil Procedure, relating to justices' courts, excepting the words "city of New

York" are substituted for the word "county," and "the clerk of the county" for "the clerk of the appellate court."

Amendment, when allowed.— See § 313.

Appeal where adverse party has died.— See § 320.

Manner of service.— See *Wells* v. *Dawson*, 7 N. Y. St. Rep. 170, 43 Hun, 509; *Andrews* v. *Snyder*, 6 Civ. Proc. Rep. 333; *Bennett* v. *Kenyon*, 5 N. Y. St. Rep. 496.

Must be served on opposite party.— The notice of appeal cannot be served on the attorney where the client resides in the city of New York. *Earll* v. *Chapman*, 3 E. D. Smith, 216.

Omission to serve one; how supplied; amendment, when allowed.— See § 313.

Proceeding where party dies pending appeal.— See § 321.

§ 313. **Omission to serve one; how supplied; amendment when allowed.**— Where the appellant, seasonably and in good faith, serves the notice of appeal, upon either the clerk or the respondent, but omits, through mistake, inadvertence or excusable neglect, to serve it upon the other, or to do any other act necessary to perfect the appeal, the appellate court, upon proof by affidavit of the facts, may, in its discretion, permit the omission to be supplied, or an amendment to be made, upon such terms as justice requires.

Notes to section 313.

This section is taken from section 3049 of the Code of Civil Procedure, relating to justices' courts, except the word "clerk" is substituted for "justice."

Amending notice of appeal.— Amending notice of appeal is discretionary with the court. See as to when allowed: *Hern* v. *Roods*, 14 N. Y. St. Rep. 345, 47 Hun, 433; *Reilly* v. *Murray*, 6 N. Y. St. Rep. 720; *McCarthy* v. *Crowley*, 24 N. Y. St. Rep. 815; *Gutbrecht* v. *Pros. Pk., etc.*, 28 Hun, 497; *Boroughs* v. *Norton*, 48 How. 132; *Gray* v. *Wolcott*, 5 N. Y. St. Rep. 49, 42 Hun, 653; *Amos* v. *Bradley*, 15 Week. Dig. 262.

§ 314. **Undertaking to stay execution upon judgment.**— If the appellant desires a stay of execution, he must give a written undertaking, executed by one or more sureties, approved by a justice of the court, to the effect that if the appeal is dismissed, or if judgment is rendered against the appellant in the appellate court, and an execution issued thereupon is returned wholly or partly unsatisfied; the sure-

ties will pay the amount of the judgment, or the portion thereof remaining unsatisfied, not exceeding a sum specified in the undertaking, which must be at least one hundred dollars, and not less than twice the amount of the judgment, or if the judgment of the court is for the recovery of a chattel, that the sureties will pay the sum fixed by that judgment as the value of the chattel, together with the damages, if any, awarded for the taking, withholding, or detention thereof. A copy of the undertaking, with a notice of the delivery thereof, must be served with the notice of appeal, and in like manner. Nothing in this section shall be construed to preclude a surety company properly authorized by law to act as such surety or sureties.

Notes to section 314.

This section is taken from section 3050 of the Code of Civil Procedure, relating to justices' courts, which made section 1335 of said Code applicable to this court. This latter section has been omitted from this one and is made the next section. The words "with a notice of the *delivery* thereof" doubtless means delivery to the clerk for filing. The next section uses the words "with notice of the *filing* thereof." Any justice of this court may now approve the undertaking, instead of as formerly only the justice who rendered the judgment, or a judge of the appellate court.

The construction of section 3050 of the Code of Civil Procedure, including and making applicable section 1335 of the Code of Civil Procedure, was decided in *Hawley* v. *Kramer*, 35 Misc. Rep. 444, 71 N. Y. Supp. 948.

Amendment of undertaking can only be had with consent of the sureties. *Langley* v. *Warren*, 1 N. Y. 606; s. c., 3 How. Pr. 363; 1 Code Rep. 111; *Wilson* v. *Allen*, 3 How. Pr. 369. Consult however *Wood* v. *Kelly*, 2 Hilt. 334; *Irwin* v. *Muir*, 13 How. Pr. 409; s. c., 4 Abb. Pr. 133. See *Robinson* v. *Moran*, 23 Week. Dig. 326.

Duty of justice to approve undertaking.— Where sureties in an undertaking are sufficient in law, the justice is judicially bound to approve the undertaking. A judge should have no private reason: it must be a judicial reason and not an arbitrary, whimsical, capricious reason. *O'Connor* v. *Moschowitz*, 48 How. 451.

Exception to, and justification of, sureties.—By section 70 of this act, sections 106 to 110 and sections 127 and 128 are made applicable to undertakings, sureties, and justification.

Mistakes, omissions, defects, irregularities, and general rules affecting affidavits, bonds, and undertakings.— See notes to § 1, subd. 3.

What is sufficient execution of the undertaking.— See *Weisbrod* v. *Margued*, 8 Abb. N. C. 243.

§ 315. **Exception to sureties.**— The respondent or his attorney, may, within five days after the service of a copy of the undertaking with notice of the filing thereof, serve upon the appellant or his attorney, a written notice that he excepts to the sufficiency of the sureties. Within five days thereafter, the sureties, or other sureties, in a new undertaking to the same effect, must justify before the court in the district in which the judgment was rendered or final order made. At least three days notice of the justification must be given. If the court finds the sureties sufficient, it must indorse its allowance of them upon the undertaking, or a copy thereof. The effect of a failure so to justify and procure an allowance, is the same as if the undertaking had not been given. The court shall also have power, in case it shall be made to appear to its satisfaction, upon motion, that the exception was taken unnecessarily or for purposes of vexation or delay, to set the same aside and approve the undertaking.

Notes to section 315.

This section is taken from section 1335 of the Code of Civil Procedure, which was included in section 3050 of said Code, and made applicable to this court, but many radical changes in omissions have been made. The time limit has been changed; also that it is unnecessary to approve the undertaking, and the appointment of a referee to examine the sureties have been omitted.

Liability of sureties.— The undertaking mentioned in this section refers to the final judgment in the cause, and the sureties remain liable until that is rendered. *Humerton* v. *Hay*, 65 N. Y. 380; *Lowery* v. *Tew*, 25 Hun, 257.

The sureties are liable for costs on dismissal of the appeal, as well as where the judgment is affirmed, and they are not released from liability by their failure to justify after being excepted to. *McSpedon* v. *Bouton*, 5 Daly, 30. See, however, *Guisburg* v. *Kunz*, 60 Hun, 504. See to the contrary, *Manning* v. *Gould*, 90 N. Y. 476.

See also notes to § 1, subd. 3.

§ 316. **Proceedings; how stayed.**— The delivery of the undertaking to the clerk of the court in the district in which

the judgment or final order was entered, and service of a copy thereof, and of notice of delivery thereof, stays the issuing of an execution upon the judgment. If the execution has been issued, the service of a copy of the undertaking, certified by the clerk or accompanied with an affidavit, showing that it is a copy, and that the original has been duly filed, upon the officer holding the execution, stays further proceedings thereunder, subject to the provisions of the next preceding section.

Notes to section 316.

This section is taken from section 3051 of the Code of Civil Procedure, relating to justices' courts.

Effect of the stay.— All further proceedings upon the judgment are stayed by the giving of the undertaking, but those already had are not affected by it. If an execution has been issued and a levy made before the appeal is perfected, no sale can be had pending the appeal. The levy is not discharged by the appeal, and the appellant cannot have the goods returned to him. *Smith* v. *Allen*, 2 E. D. Smith, 259. See § 1311, Code Civ. Proc.

Levy upon personal property, when superseded by appeal.— When appeal has been perfected, and the security required to stay execution of the judgment has been given, or where the security given in this court is equal to that required to perfect an appeal to the Court of Appeals, the court may in its discretion, and upon such terms as justice requires, make an order upon notice to the respondent and the sureties in the undertaking, discharging a levy upon personal property, made by virtue of an execution, issued upon the judgment appealed from. But this section does not authorize the discharge of a levy, made by virtue of a warrant of attachment. See § 1311, Code of Civ. Proc.

§ 317. **Return.**— The clerk of the court or his successor in office, must within thirty days from the service of the notice of appeal and the payment of the cost and fees as prescribed in this act, make a return to the appellate court, annex thereto the notice of appeal and the undertaking, if any has been delivered to him, and cause the same to be filed with the clerk of the appellate court. The return must contain all the proceedings, including the evidence and the judgment. The stenographer's minutes of the evidence must be furnished to the clerk, by the stenographer, within ten days after the fees therefor have been paid. Such re-

turn must have indorsed thereon the allowance of the justice before whom the action or proceeding was tried.

Notes to section 317.

This section is taken from section 3053 of the Code of Civil Procedure, relating to justices' courts.

There is no provision for "the payment of the '*costs*' and fees as prescribed in this act." It is nowhere prescribed in this act that "the cost," or the costs are to be paid, or to whom. Section 347, subdivision 3, is a provision for the payment to "clerks" of the court, "for a return upon an appeal from a judgment, or order, two dollars."

See note to § 311.

Amending or correcting return can be done by motion to the court. *Spence* v. *Beck*, 1 Hilt. 276; *Kilpatrick* v. *Carr*, 2 Abb. Pr. 117; *Mitchell* v. *Menkle*, 1 Hilt. 142; *Kelly* v. *Brower*, 1 Hilt. 514.

The averment that it is untrue, or incorrect, and defective in its statements, or that it contains immaterial matters, is insufficient. Nor is the fact that the attorney for the defendant drew it up, and that it was afterward "corrected, altered, and fixed" by the justice, unless abuse is clearly shown. *Smith* v. *Johnson*, 30 How. Pr. 374; *Hunter* v. *Graves*, 4 Cow. 437.

When it does not state the pleadings in substance, or set them forth, a copy of them should be annexed and referred to. *Spring* v. *Baker*, 1 Hilt. 526; *Smith* v. *Van Brunt*, 2 E. D. Smith, 534.

Where it did not show in what manner a material question in the matter of the admissibility of evidence had been disposed of, the case must be put over for an amended return. *Matthews* v. *Fiestel*, 2 E. D. Smith, 90.

Where it sets forth the evidence in detail, it is to be considered as stating the whole testimony, unless the contrary distinctly appears. *Orcutt* v. *Cahill*, 24 N. Y. 578. The fact that it was proved that a former trial has been had between the same parties, when the return does not show how such trial terminated, will not warrant the reversal of the judgment upon an issue there, on a plea of "former judgment." *Morrill* v. *Whitehead*, 4 E. D. Smith, 239.

Id.; cause of action.— Plaintiff having recovered a money judgment for the last installments due on a conditional sale, by default, the return cannot thereafter be amended so as to make the cause of action conversion, though plaintiff might originally have sued therefor. *Malawista* v. *Malzoni*, 35 Misc. Rep. 295, 71 N. Y. Supp. 771.

Id.; conflict.— The return must govern where the affidavits of the parties are in conflict, as to whether an adjournment was made on the 18th or 19th. *Kelly* v. *Brower*, 1 Hilt. 514.

Id.; voluntary amendment by justice.— Upon an appeal, the return of the justice should not be altered or added to by him without applying

for leave of court. If he voluntarily make an amended or supplemental return, the court may direct it to be taken from the files. *Zabriskie* v. *Wilder*, 12 Daly, 527; s. c., 67 How. Pr. 311. This case is distinguished in *Thomas* v. *Whitelegge*, 39 N. Y. St. Rep. 89; s. c., 14 N. Y. Supp. 779

Id.; when too late.— It is too late to ask for an amendment of a return after the appellate court has intimated or announced its decision on the questions presented by the return as filed. *Warren* v. *Campbell et al.*, 9 Daly, 762; s. c., 14 N. Y. Supp. 165; *Persons* v. *Campbell et al.*, 9 Daly, 762.

Attacking return.— Where the return to an appeal taken on the ground of an unauthorized appearance shows that the appellant was personally present in court and examined as a witness in behalf of the defendants, there being but one other defendant beside himself, such return cannot be attacked by affidavits. *Jennings* v. *Miller*, 10 Misc. Rep. 762.

Conclusive on argument of appeal.— The appeal should not be argued until the return is complete, for it is conclusive as to what transpired at the trial. *McAllister* v. *Sexton*, 4 E. D. Smith, 41; *Kilpatrick* v. *Carr*, 3 Abb. Pr. 117.

The appellate court cannot look beyond the return — although the appellant produces affidavits of facts which, had they appeared in the return, would require a reversal of judgment. *Trust* v. *Delaplaine*, 3 E. D. Smith, 219. The appellate court is controlled by the return, in determining what instructions the charge contained. *Garrison* v. *Pearce*, 3 E. D. Smith, 255; *Barbar* v. *Stettheimer*, 13 Hun, 196.

Contradictory statement in return; reversal.— The return stated that judgment was rendered in favor of the plaintiff, "as set forth in the judgment annexed." No judgment was annexed, except a memorandum reciting certain items of claim, and concluding: "Therefore, judgment for defendant, that he retain possession of one roan horse to satisfy a lien of $25." *Held*, that such judgment would be reversed. *Lees* v. *Pitney*, 27 N. Y. Supp. 972.

Contents of return.— The return should set forth when the summons or process was returnable, the day on which issue was joined, the adjournments, if any, the date of the trial, and the day whereon judgment was rendered (*Peters* v. *Diossy*, 3 E. D. Smith, 115); the pleadings and all the evidence, documentary and parol, used on the trial. *Ogden* v. *Sanderson*, 3 E. D. Smith, 167; *Roulston* v. *McClelland*, 2 E. D. Smith, 60. See also *Smith* v. *Van Brunt*, 2 E. D. Smith, 534; *Orcutt* v. *Cahill*, 24 N. Y. 578; *Low* v. *Payne*, 4 N. Y. 247; *Prosser* v. *Seen*, 5 Barb. 607; *McCaffrey* v. *Kelley*, 2 Sandf. 637; *Belsham* v. *Coolie*, 1 E. D. Smith, 213. Where judgment is rendered without proof, and on default, upon a return of the personal service of a summons and complaint, it should show that a copy of the complaint was served, verified by the party pleading, or his agent or attorney, as the

case may be. A mere return that a summons was served with the complaint is not sufficient. *Spring* v. *Baker*, 1 Hilt. 526. Where objection is taken to the sufficiency of the summons, it should properly set forth the summons, instead of giving a mere abstract of it. A copy of the summons would have been the proper return to submit. *Silkman* v. *Boiger*, 4 E. D. Smith, 236.

The return must show what judgment was rendered, or the appeal will be dismissed with costs. *Woodside* v. *Pender*, 2 E. D. Smith, 390. *Contra*, *Klenck* v. *De Forrest*, 3 Code Rep. 185.

Where an account was demanded on joining issue, the return should show that it was ordered to be exhibited or stated, or an objection to evidence based upon the demand, and neglect to furnish cannot prevail upon appeal. *Rosen* v. *Rosenthal*, 22 Misc. Rep. 143.

Defective return.— If the return has not the notice of appeal attached, or does not show what judgment was rendered, the appeal will be dismissed. *Cabre* v. *Sturges*, 1 Hilt. 160; *Davis* v. *N. Y. & Erie R. R. Co.*, 1 Hilt. 543; *Bush* v. *Dennison*, 14 How. Pr. 307; *Woodside* v. *Pender*, 2 E. D. Smith 390; *Klenck* v. *De Forrest*, 3 Code Rep. 185.

Affidavits cannot be used to support a defective return. *McAllister* v. *Sexton*, 4 E. D. Smith, 41; *Hyland* v. *Sherman*, 2 E. D. Smith, 235; *Trust* v. *Delaplaine*, 3 E. D. Smith, 219; *Rawson* v. *Grow*, 4 E. D. Smith, 18; *Kirkpatrick* v. *Carr*, 3 Abb. Pr. 117. Nor to modify or impeach it. *Lynsky* v. *Pendergast*, 2 E. D. Smith, 43; *Kirkpatrick* v. *Carr*, 3 Abb. Pr. 117; *Capewell* v. *Ormsby*, 2 E. D. Smith, 180; *Bates* v. *Conkling*, 10 Wend. 289. The rule is the same with regard to the charge to the jury. *Garrison* v. *Pierce*, 3 E. D. Smith, 255.

Denial of service of summons.— Section 3046, Code of Civil Procedure (now section 311 of this act), allows an appeal "wherein he did not appear and the summons was not personally served upon him." In such a case a return by the justice, stating whether the defendant appeared or not, is indispensable. *Jennings* v. *Miller*, Bischoff, J., Special Term, N. Y. Law Journal, Dec. 20, 1894, afterward heard on the return and reported in 10 Misc. Rep. 762. See also *Vallen* v. *McGuire*, 18 N. Y. St. Rep. 410, 49 Hun, 594; *Gibbons* v. *Van Alstine*, 29 N. Y. St. Rep. 461.

Evidence excluded.— A party may compel the return of evidence stricken out, in order that he may bring more distinctly before the appellate court the points relied upon for a reversal of the decision. *Smith* v. *Johnston*, 30 How. Pr. 374.

Id.; omission of, in return; remedy.— A judgment cannot be reversed on appeal, on the alleged ground that it is without evidence to support it, or that it is against the evidence, or the weight of evidence, if it affirmatively appears from the justice's return that material evidence adduced on the trial is omitted, and that the respondent could not have caused the omission to be supplied by means of an amended return. In such case, appellant should make application on the argument of the

appeal, under sections 3050 and 3213 of the Code, to be allowed to establish the lost evidence by affidavits or the examination of witnesses. *McGovern* v. *Eldredge*, 48 N. Y. St. Rep. 692.

Extension; time to file return.— The time to file the return on appeal from a final order in summary proceedings to recover possession of premises alleged to be used as a bawdy-house will not be extended where the appeal is taken only upon technical grounds, it being conceded that the evidence establishes the charge, and the only excuse offered is that the attorney was engaged in various courts and places, and the want of a male stenographer to transcribe the notes. *Goelet et al.* v. *Julia Lawlor et al.*, 19 Misc. Rep. 540.

Failure to file return.— A motion may be made to dismiss the appeal. See Rule III, Supreme Court, Appellate Term (to be found under this section).

False return; liability of justice.— The justice is liable for a false return, for any damages which a party may sustain. He acts ministerially. *McDonnell* v. *Buffum*, 31 How. Pr. 154; *Houghton* v. *Swartout*, 1 Den. 589; *Tompkins* v. *Sands*, 8 Wend. 462; *Cunningham* v. *Bucklin*, 8 Cow. 178; *Scott* v. *Rushman*, 1 Cow. 202.

Fee for return, nonpayment of, is ground for dismissal, when the return is not made for that reason. *Van Henson* v. *Kirkpatrick*, 5 How. Pr. 422. See § 347, subd. 3.

Further return.— There is no express provision for a further return as was formerly provided by section 3055 of the Code of Civil Procedure; such return can probably be enforced under that section by section 20 of this act, or by motion for an amended return.

Motion to dismiss appeal.— Rule III of the Supreme Court for the Appellate Term provides for the making of such motion, and that it be made at the Appellate Term.

Where the appellant, although given an opportunity to do so, fails to procure a return which includes the evidence, a motion to dismiss the appeal on the ground of failure to procure the filing of the return should be granted. *Orlando* v. *Piano*, 20 Misc. Rep. 369.

Order to show cause.— Where a party obtains an order requiring a justice to amend his return or show cause, the justice is authorized to immediately file his amended return, and this alternative portion of the order is not an adjudication in advance by the court upon a contested motion. Where a justice is served with an order to make an amended return to his return on appeal, or show cause, and make his return, it cannot be vacated on the ground that the order was obtained through irregularity or fraud; the remedy of the party aggrieved is to move for a further amended return, or to proceed against the justice for a false return. An order requiring a justice to make an amended return or show cause, returnable in more than eight days, is not irregular under section 780 of the Code. *Thomas et al.* v.

Whitelegge, 39 N. Y. St. Rep. 89; s. c., 14 N. Y. Supp. 779, distinguishing *Zabriskie* v. *Wilder*, 12 Daly, 527.

Original or certified copy; lost return.— An original or a certified copy of the return must be produced on the argument, or the court will refuse to hear the appeal. In case it is lost, a new one should be procured. *Smith* v. *Van Brunt*, 2 E. D. Smith, 534.

Rules as to return on appeal.— The justices of the Appellate Division of the Supreme Court have made seven rules for the hearing of appeals by the Appellate Term. It will be observed that these rules are not made by the justices of the Appellate Term. See these *rules*, pp. 434, 435. Rule II provides that no appeal shall be placed upon the calendar unless the return is filed eight days before the term commences. Rule III provides if the return is not filed as prescribed in section 3053 of the Code of Civil Procedure (now this section), the respondent may move to dismiss the appeal, and if the court below shall not have made the return, the appellant may move on the first day of the term to compel such return by attachment. See also §§ 318 and 325.

Stenographer's minutes lost.— Where the return of the justice did not contain any of the evidence, the stenographer's minutes having been lost or destroyed,— *Held*, that the parties could submit affidavits as to the evidence offered at the trial, in accordance with the Code of Civil Procedure, section 3056. *Walker* v. *Baermann*, 47 App. Div. 635, 62 N. Y. Supp. 414.

Sufficient.— A certificate on appeal from this court, that counsel summed up the case "and thereupon submitted to the jury for its decision," — *Held* sufficiently to show that the issues were determined by the jury. *Morgan* v. *Metropolitan Street Ry. Co.*, 51 App. Div. 633, 64 N. Y. Supp. 826.

Unauthorized appeal.— A motion made to dismiss an appeal of this character must be granted. *Robb* v. *Osgoodby*, 20 Misc. Rep. 622.

§ 318. **Settlement of case on appeal.**— Immediately upon receiving the minutes from the stenographer, as provided in the next preceding section, the clerk of the court shall cause notice of that fact to be sent to the attorney for the appellant, or to the appellant if he has not appeared by attorney. The appellant or his attorney shall then procure the case to be settled on a written notice of at least three days, served in the manner provided for the serving of a notice of appeal, or on the attorney for the respondent, and made returnable before the justice who tried the case, in the court house in the district in which said justice may then be sitting. Said justice shall thereupon within five days, settle

the case or exceptions upon it, if there be any, and indorse the return, as provided in the next preceding section. After a justice is out of office, he may settle the case or exceptions or make any return of proceedings had before him while he was in office, and may be compelled so to do by the appellate court.

Notes to section 318.

This section is new. The portion relating to the settlement of a case on appeal, after a justice is out of office, is taken from section 25 of the Code of Civil Procedure. See § 3054, Code Civ. Proc., entitled "When justice has gone out of office," relating to justices' courts, which is similar.

This section is not intended to assimilate the practice in this court to that in courts of record, for it will be observed that there is no provision for a proposed case, or proposed amendments. When the stenographer's minutes have been furnished to the clerk, he shall immediately notify the appellant of that fact, and the appellant shall notify the respondent. The parties, or their attorneys, then appear before the justice, and they are heard as to the settlement of the case; this will make the case, or return on appeal, more perfect than heretofore, when the justice alone, and unaided, made up the return, and will prevent multiplicity of motions to correct or amend the return. The parties have had their day in court before the justice as to what the return, or case on appeal, shall contain, and as to its correctness, which was not the case heretofore, and this should end all further hearings on motion about the contents or correctness of the return.

See also Rule 20, "Rules of Practice," p. 111.

§ 319. **When justice is dead, et cetera.**— If the justice dies, becomes a lunatic, absconds, removes from the state, or otherwise becomes unable to make the return, the appellate court may receive affidavits, or examine witnesses, as to the evidence and other proceedings taken, and the judgment rendered, before the justice; and may determine the appeal, as if a return had been duly made by the justice.

Note to section 319.

This section is the same as section 3056 of the Code of Civil Procedure, relating to justices' courts.

§ 320. **Appeal when adverse party has died.**— Where the adverse party has died, since the making of the order, or the

rendering of the judgment appealed from, or where the judgment appealed from was rendered, after his death, in a case prescribed by law, an appeal may be taken, as if he was living; but it cannot be heard, until the heir, devisee, executor, or administrator, as the case requires, has been substituted as the respondent or appellant. In such a case an undertaking required to perfect the appeal, or to stay the execution of the judgment or order appealed from, must recite the fact of the adverse party's death; and the undertaking enures, after substitution to the benefit of the person substituted.

Note to section 320.

This section is substantially the same as section 1297 of the Code of Civil Procedure.

§ 321. **Proceedings when party dies pending appeal.**— Where either party to an appeal dies before the appeal is heard, if an order, substituting another person in his place, is not made within three months after his death, the court in which the appeal is pending, may, in its discretion, make an order requiring all persons interested in the decedent's estate, to show cause before it why the judgment or order appealed from should not be reversed or affirmed or the appeal dismissed, as the case requires. The order must specify a day when cause is to be shown, which must not be less than six months after making the order; and it must designate the mode of giving notice to the persons interested. Upon the return day of the order, or at a subsequent day, appointed by the court if the proper person has not been substituted, the court, upon proof by affidavit, that notice has been given, as required by the order, may reverse or affirm the judgment or order appealed from, or dismiss the appeal, or make such further order in the premises as the case requires.

Note to section 321.

This section is taken from section 1298 of the Code of Civil Procedure.

§ 322. **Order of substitution.**— Where personal service of notice of application for an order has been made, within the city, upon the proper representative of the decedent, an order of substitution may be made, upon the application of the surviving party.

Note to section 322.

This section is taken from section 1299 of the Code of Civil Procedure.

§ 323. **Restitution upon reversal.**— Where the judgment or final order is reversed or modified, the appellate court may make or compel restitution of property or of a right, lost by means of the erroneous judgment; but not so as to affect the title of a purchaser, in good faith and for value, or property sold by virtue of a warrant of attachment in the action, or an execution issued upon the judgment. In that case, the appellate court may compel the value, or the purchase price to be restored, or deposited to abide the event of the action, as justice requires. Six days' notice of an application for an order for restitution must be given; and, if the application is granted before judgment, the proper direction may be included therein.

Notes to section 323.

This section is the same as section 3058 of the Code of Civil Procedure, relating to justices' courts, except that the words "of the justice" are omitted.

Action.— Section 3058 of the Code of Civil Procedure was enacted to furnish additional means of enforcing the common-law right of restitution. The remedies prescribed therefor are not exclusive, and a party entitled to restitution may obtain relief by action. *Huebler* v. *Myers*, 132 N. Y. 363.

Notice of motion.— An application for restitution of the amount of a judgment erroneously rendered against defendant in this court, and paid, made on appeal from the judgment, cannot be entertained, as six days' notice must be given under Code Civ. Proc., § 3058. *Darcey* v. *Steger*, 23 Misc. Rep. 145, 50 N. Y. Supp. 638.

Practice in such cases explained. See *Cushing* v. *Vanderbilt*, 7 Daly, 512. See also *Marvin* v. *Brewster Mining Co.*, 56 N. Y. 671; *Estus* v. *Baldwin*, 9 How. 80.

§ 324. **Setting off costs and recovery.**— If, upon the appeal, a sum of money is awarded to one party, and costs are awarded to the adverse party, the appellate court must set off the one against the other, and render judgment for the balance.

Note to section 324.

This section is the same as section 3059 of the Code of Civil Procedure, relating to justices' courts.

§ 325. **Hearing on appeal, dismissal thereof; reversal on stipulation.**— Within twenty days after the service of a notice of appeal on the respondent, he may serve upon the appellant or his attorney, a written stipulation that the judgment appealed from may be reversed with five dollars' costs and disbursements of the appeal, and thereafter no further steps shall be taken in such appeal, except to enter judgment in pursuance of such stipulation for the enforcement thereof; in case such stipulation shall not be served, the appeal may be brought to a hearing in the appellate court at any term thereof, at which such an appeal can be heard, held after the return is filed, upon a notice by either party, of not less than eight days. It must be placed upon the calendar, and must continue thereupon without further notice until it is finally disposed of. If, after being regularly placed upon the calendar, neither party brings it to a hearing before the end of the second term thereafter at which it might be noticed for hearing and heard, the court must dismiss the appeal unless it directs the same to be continued for cause shown.

Notes to section 325.

This section is taken from section 3062 of the Code of Civil Procedure, relating to justices' courts.

Motion to dismiss appeals must be made before the Appellate Term as required by Rule III of the Supreme Court, Appellate Term, to be found on p. 434.

Points should be furnished by counsel on the submission of an appeal, and the court referred to such authorities as are relied on. *De Agreda* v. *Faulberg*, 3 E. D. Smith, 178. Where no papers specifying the grounds of appeal, and no points or arguments are presented on behalf of the appellant, calling the attention of the court to any grounds for

sustaining the appeal, the court, if it sees that justice has apparently been done, will not be ingenious to discover errors in the proceedings below, but will rather assume that if the appellant or his counsel cannot discover and point out errors, none exist. *Suydam* v. *Munson*, 2 E. D. Smith, 198.

Where, on appeal from a judgment, the appellant's counsel in his points takes no notice of the exceptions taken on the trial, the court may refuse to consider them. *Mierson* v. *Mayor*, 6 Daly, 74.

Ready for argument.— The appellate court requires both parties to be ready for argument when the case is called. Engagements of counsel are not considered an excuse for postponing the hearing. *Tryon* v. *Jennings*, 12 Abb. Pr. 33; s. c., 22 How. Pr. 421; Rule III, to be found on p. 434.

Waiver of motion to dismiss.— When the respondent generally appears in the appellate court, and notices the appeal for argument, these are positive acts of submission to that tribunal, inconsistent with a claim that the appeal was not brought in time. In such a case he cannot have the appeal dismissed. *Pearson* v. *Lovejoy*, 35 How. Pr. 193; s. c., 53 Barb. 407.

§ 326. **Judgment.**— In a case specified in this act, the appeal must be heard upon the original papers, or a certified copy thereof, and a copy or copies thereof need not be furnished for the use of the court. The appellate court must render judgment according to the justice of the case, without regard to technical errors or defects which do not affect the merits. It may affirm or reverse the judgment of the municipal court, in whole or in part, and as to any or all of the parties, and for errors of law or of fact, and where the judgment is contrary to or against the weight of evidence, the appellate court may, upon its reversal of a judgment, order a new trial as prescribed in this act.

Notes to section 326.

This section is taken from section 3063 of the Code of Civil Procedure, relating to justices' courts. See also § 310, as to powers on appeal.

See cases on this section, *Tuttle* v. *Dennis*, 58 Hun, 39; *Southard* v. *Becker*, 15 Misc. Rep. 438; *Merris* v. *Hurst*, 71 Hun, 483; *McLaughlin* v. *Harriot*, 14 Misc. Rep. 344; *Frink* v. *Steven*, 88 Hun, 283.

§ 327. **Clerk appellate court to return papers, et cetera.**— Upon the rendering of judgment of the appellate court,

affirming, modifying or reversing a judgment or order of the municipal court, the clerk of the appellate court, shall return to the district of the municipal court from which the appeal was taken, all the papers on file in his office making up the judgment-roll of said action or proceeding.

Notes to section 327.

This section is new and is similar to a *remittitur*.

WHAT IS APPEALABLE.

See also notes to § 310.

Adjournments, illegal, appearing on the face of the record. *Chevra Brei, etc.* v. *Chevra Bikur, etc.*, 23 Misc. Rep. 367, 51 N. Y. Supp. 236.

Amendment.— Refusal to allow at any time before, or during the trial. *King* v. *Darmann*, 26 Misc. Rep. 133, 55 N. Y. Supp. 876.

Discontinuance.— Refusal to allow. *Goldberg* v. *Victor*, 26 Misc. Rep. 728, 56 N. Y. Supp. 1044.

Id.— At close of testimony. Exception necessary. *Transcendent L. Co.* v. *Stirtz*, 35 Misc. Rep. 305, 71 N. Y. Supp. 947.

Irregularity in issue of *alias* summons. *Loeb* v. *Smith*, 24 Misc. Rep. 200, 52 N. Y. Supp. 677.

Jurisdiction.— Judgment void for irregularity in the issue of *alias* summons. *Loeb* v. *Smith*, 24 Misc. Rep. 200, 52 N. Y. Supp. 677.

Orders.— Appeals from, are allowed by sections 253 and 257. See notes to § 310.

WHEN APPEAL WILL NOT LIE AND QUESTIONS NOT REVIEWABLE.

Amendments on appellant's request. *Orser* v. *Grossman*, 11 How. Pr. 250; s. c., 4 E. D. Smith, 443.

Conflicting evidence; prejudice, passion, partiality.— The determination upon conflicting evidence is not the subject of review on appeal unless it appears there was influence by prejudice, passion, or partiality. *Goodman* v. *Riccadonne*, 13 Misc. Rep. 66.

Defective pleadings.—*Tift* v. *Tift*, 4 Den. 175; *Neff* v. *Clute*, 12 Barb. 66; *Bell* v. *Davis*, 8 Barb. 210; *Hall* v. *McKechnie*, 22 Barb. 245; *Young* v. *Rummell*, 5 Hill, 60.

Denial of motion; leave to renew; judgment entered meanwhile.— The remedy is to move to open the judgment — an appeal from it will not lie. *Edelson* v. *Epstein*, 27 Misc. Rep. 543, 58 N. Y. Supp. 334.

Discretion.— Matters resting in the discretion of the court are not reviewable, unless they affect a substantial right. *Mitchell* v. *Menkle*,

1 Hilt. 142; *Brown* v. *Jones*, 3 Abb. Pr. 80; s. c., 1 Hilt. 204; *Keller* v. *Feldman*, 49 N. Y. St. Rep. 718; *Tooker* v. *Booth*, 7 Misc. Rep. 421; *Harry* v. *Coffin*, 11 Daly, 180.

As to what is proper legal discretion, see *O'Connor* v. *Moschowitz*, 48 How. 451.

Order vacating order opening default for noncompliance with conditions.— Appeal will not lie from the second order. *Schwartz* v. *Schendel*, 23 Misc. 47, 51 N. Y. Supp. 415.

Id.— Vacating a judgment on the ground that there had been no service or voluntary appearance, nor from an order vacating the first order and denying the original motion. *Adolph* v. *Klein*, 23 Misc. Rep. 700; s. c., 52 N. Y. Supp. 32.

WHAT OBJECTIONS MAY BE RAISED ON THE APPEAL.

Assumption of fact not proven.— *Lee* v. *Schmidt*, 1 Hilt. 537. injustice was done, although no exception was taken. *Maier* v. *Homan*, 4 Daly, 168.

Jury trial.— Denial of, although no exception was taken. *Meech* v. *Brown*, 1 Hilt. 257; s. c., 4 Abb. Pr. 19.

Dismiss complaint at close of testimony.— In considering an appeal the court is not concluded by the absence of such a motion. *The Boston, etc.* v. *The Metropolitan, etc.*, 14 Misc. Rep. 571.

Unanswerable.— An objection which the opposite party could not have answered by further evidence, or by any act on his part. *Tift* v. *Tift*, 4 Den. 175; *Newcomb* v. *Clarke*, 1 Den. 226; *Pepper* v. *Haight*, 20 Barb. 429.

WHAT OBJECTIONS CANNOT BE RAISED FOR THE FIRST TIME ON APPEAL.

Jurisdiction is waived, unless raised in court below. See *Bang* v. *McEvoy*, 52 App. Div. 501.

Objections or proof which might have been obviated at the trial, if objection had then been made. *Binsse* v. *Wood*, 37 N. Y. 532; *Thayer* v. *Marsh*, 75 N. Y. 540; *Blair* v. *Flack*, 141 N. Y. 56; *Bliss* v. *Sickles*, 142 N. Y. 648; *Appleton* v. *Welch*, 20 Misc. Rep. 343.

Id.; must be specific.— The court does not favor a deceptive, secret, or unfair mode of raising an objection; and therefore such objections as could have been fairly answered if they had been seasonably made, will be disregarded, if not specifically taken below. *Coon* v. *Syracuse & Utica R. R. Co.*, 5 N. Y. 492; *Dayharsh* v. *Enos*, 5 N. Y. 531; *Peck* v. *Richmond*, 2 E. D. Smith, 381; *Barnes* v. *Perrine*, 12 N. Y. 18; *Fowler* v. *Clearwater*, 35 Barb. 143.

When an irregularity is objected to, or when improper evidence is offered, the party objecting must fully, clearly, and distinctly state

the grounds of objection. A general objection may be sufficient in some cases, as, for instance, where the objection could not have been obviated had it been specifically pointed out. *Merritt* v. *Seaman*, 6 N. Y. 168. Where an objection is general and the evidence is proper, but the mode of proving it is improper, the court will presume that the objection is not made to the manner, but the matter, and the objection will be unavailing. *Bellows* v. *Sackett*, 15 Barb. 96.

Wrong district.— The objection that the defendant did not reside within the judicial district. *Weuthen* v. *Eyelis*, 33 Misc. Rep. 98, 67 N. Y. Supp. 246, 8 N. Y. Annot. Cas. 372; *Barker* v. *Archer*, 49 App. Div. 80, 63 N. Y. Supp. 298; *Kockle* v. *Pangborn*, 33 Misc. Rep. 476, 67 N. Y. Supp. 898.

WHEN JUDGMENT WILL BE AFFIRMED.

Account or bill of particulars, refusal to furnish, is no ground for reversal. See *Rosen* v. *Rosenthal*, 22 Misc. Rep. 143, 48 N. Y. Supp. 790.

Adjourn, refusal to, no ground for reversing judgment. *Onderdonk* v. *Ranlett*, 3 Hilt. 323; *Irroy* v. *Nathan*, 4 E. D. Smith, 68; *Decker* v. *Russel*, 26 How. Pr. 528.

Amendment from breach of contract to tort is no ground for reversal. *Doughty* v. *Crozier*, 9 Abb. Pr. 411. See however *Andrews* v. *Bond*, 16 Barb. 633.

Id., refusal to allow, can only be when no injustice would result from granting the application. A motion made on the trial to amend an answer so as to add a new defense is properly refused. *Tattersall* v. *Hass*, 1 Hilt. 56; *Waldheim* v. *Sichel*, 1 Hilt. 45.

Appellant not appearing; default.— An appeal was noticed for argument, and placed on the calendar by the appellant. On the case being called, the appellant not appearing, the judgment was affirmed by default, on motion of the respondent, and without any proof being required of his having noticed the appeal for argument. *Held* regular. *Townsend* v. *Keenan*, 2 Hilt. 544. See also *Luft* v. *Graham*, 44 How. Pr. 152.

The court will affirm the judgment, if the appellant does not appear to argue the appeal. *Geraghty* v. *Malone*, 1 Code Rep. 674; *Bellony* v. *Alexander*, 1 Code Rep. 64; *Townsend* v. *Keenan*, 2 Hilt. 545.

If respondent fails to appear the appellant may either argue or submit his case, but judgment of reversal by default will not be allowed. Rule VI, Supreme Court Rules for Appellate Term. See p. 435.

Bias, corruption, palpable mistake, partiality, passion, prejudice, conflicting, and weight of evidence.— A judgment rendered upon conflicting evidence will not be reversed, though the number of witnesses, but not necessarily the weight of evidence, preponderates against it, in the absence of apparent mistake, or bias prejudice, passion, or corrup-

tion. *Manhattan F. A. Co.* v. *Weber*, 22 Misc. Rep. 729, 50 N. Y. Supp. 42; *Berman* v. *Goldsand*, 22 Misc. Rep. 735, 49 N. Y. Supp. 1098; *Morgan* v. *Enright*, 22 Misc. Rep. 737, 49 N. Y. Supp. 1106.

Charging jury.— Omission or refusal of the justice to do so is not error. *Pettit* v. *Ide*, 12 Abb. Pr. 44.

Contract and tort.— A judgment will not be reversed though on the ground that a complaint which was for a conversion, relied on an implied contract, the evidence could only support an action for tort, where it appears that the defendant was not misled. *Doughty* v. *Crozier*, 9 Abb. Pr. 411.

Credibility and veracity of witnesses.— The judgment will not be disturbed, when the credibility of the witnesses respectively is the determining factor (*Kenke* v. *Standard Oil Co.*, 25 Misc. Rep. 761, 54 N. Y. Supp. 124); or upon an estimate of the relative veracity of the witnesses. *Fajen* v. *German D. F. Church*, 27 Misc. Rep. 797.

Cross-appeal.— The respondent must bring cross-appeal to take advantage of error. Where this is not done, and the return clearly shows that an error was committed, it will furnish no ground for reversing the judgment. *Robbins* v. *Codman*, 4 E. D. Smith, 316; *Glassner* v. *Wheaton*, 2 E. D. Smith, 352; *Lee* v. *Schmidt*, 13 Abb. Pr. 183; s. c., 1 Hilt. 537; *Berrian* v. *Elmstead*, 4 E. D. Smith, 279.

Evidence on the appeal cannot be received for the purpose of reversing a judgment, though it may be received to sustain one. *Flanagan* v. *Callanan*, 22 Misc. Rep. 139, 48 N. Y. Supp. 708.

Id.; conflicting; injustice done.— A judgment rendered upon conflicting evidence will not be reversed unless it is clear that injustice has been done. *Paterson Gas Co.* v. *Lichtenstein*, 9 Misc. Rep. 126; *Mitchell Vance Co.* v. *Dalker*, 46 N. Y. St. Rep. 189; s. c., 19 N. Y. Supp. 378; *Goodman* v. *Riccadonna*, 13 Misc. Rep. 66. See also *Conroy* v. *Allen*, 23 Misc. Rep. 125, 56 N. Y. Supp. 610; *Bannon* v. *Levi*, 23 Misc. Rep. 130, 50 N. Y. Supp. 659; *Burkhard* v. *Hagemeyer, etc.*, 23 Misc. Rep. 167, 56 N. Y. Supp. 667; *Kingston* v. *Berry*, 26 Misc. Rep. 803, 58 N. Y. Supp. 331; *Jackson* v. *New Amsterdam G. Co.*, 27 Misc. Rep. 777, 57 N. Y. Supp. 753; *Baertz* v. *Kruger*, 58 N. Y. Supp. 1109; *Karper* v. *Engelhart*, 57 N. Y. Supp. 245; *Furber* v. *Marcus*, 41 App. Div. 425, 58 N. Y. Supp. 867.

Judgment of this court rendered for defendant, resisting a balance claimed to be due for painting a building, on the ground the contract therefor was not duly performed,— affirmed, it not appearing that injustice resulted. *Hall* v. *Jones*, 58 N. Y. Supp. 1063.

Id., illegal, is not error if there is valid evidence to sustain the judgment. *Buck* v. *Waterbury*, 13 Barb. 116; *Shorter* v. *People*, 2 N. Y. 193; *Harper* v. *Leal*, 10 How. Pr. 278.

The admission of incompetent or illegal evidence will not be cured by a subsequent direction by the justice to the jury to disregard it.

Penfield v. *Carpenter*, 13 Johns. 350; *Irvine* v. *Cook*, 15 Johns. 239; *Tuttle* v. *Hunt*, 2 Cow. 436.

A ruling in favor of admitting illegal evidence will do no harm, if no evidence is given under the decision. *Howland* v. *Willetts*, 9 N. Y. 170; *Vallance* v. *King*, 3 Barb. 548.

Id., immaterial.— A judgment will not be reversed because of the admission of immaterial evidence, when it can be seen that no harm resulted from its admission (*Moore* v. *Somerindike*, 1 Hilt. 199; *Spencer* v. *Saratoga, etc., R. R. Co.*, 12 Barb. 282; *Best* v. *Smith*, 5 Barb. 283; *Buck* v. *Waterbury*, 13 Barb. 116; *Andrews* v. *Harrington*, 19 Barb. 343; *Wells* v. *Cone*, 55 Barb. 585, 589); as where the fact intended to be proved thereby is already sufficiently established by other evidence. *Crane* v. *Hardman*, 4 E. D. Smith, 448; *Buck* v. *Waterbury*, 13 Barb. 116.

Id.; sufficiency.— The finding of a justice, based on sufficient evidence, will not be disturbed on appeal. *Neilson* v. *Ray*, 44 N. Y. St. Rep. 125; s. c., 17 N. Y. Supp. 500, citing *Henry* v. *Betts*, 1 Hilt. 156; *Shaver* v. *Gillespie*, 46 N. Y. St. Rep. 771; s. c., 19 N. Y. Supp. 237, citing *Scholl* v. *Albany Steel Co.*, 101 N. Y. 602.

The findings of the trial judge where there is sufficient evidence to sustain them will be sustained, although the Appellate Term might have come to a different conclusion. *Lynch* v. *Kluber*, 20 Misc. Rep. 601; *Lowenthal* v. *Copland*, 18 Misc. Rep. 6; *Foster* v. *Meeks*, 18 Misc. Rep. 463.

Facts.— Judgment will not be reversed on the facts unless injustice has been done. *Gwillin* v. *Smith*, 26 Misc. Rep. 784, 56 N. Y. Supp. 226; *Schmitz* v. *Stahl*, 26 Misc. Rep. 788, 56 N. Y. Supp. 195; *Lewis* v. *Hosey*, 26 Misc. Rep. 789, 56 N. Y. Supp. 200; *Smith* v. *Davis*, 26 Misc. Rep. 798, 56 N. Y. Supp. 183; *Lewis* v. *Heydenreich*, 26 Misc. Rep. 833, 56 N. Y. Supp. 1014; *King* v. *Krain*, 60 N. Y. Supp. 264.

Id.; conflicting evidence.— The Appellate Term will not review the judgment on the facts, if the evidence, though conflicting, is sufficient to support it. *Cassady* v. *Horton*, 32 Misc. Rep. 148, 65 N. Y. Supp. 626.

Error of fact.— The Appellate Term will not order a new trial, under Code of Civil Procedure, section 3057, for an error or mistake of the justice in finding the facts, the term "error of fact" meaning facts affecting the validity or regularity of the proceedings and not appearing in the record, such as death, coverture, or infancy of one of the parties. *Tarder* v. *Bezozi*, 34 Misc. Rep. 551, 69 N. Y. Supp. 1047.

Failure to move to dismiss the complaint.— Where there is no motion to dismiss at the close of the entire case, an exception to a denial of a motion for nonsuit at the close of plaintiff's case is not available on appeal. *Sullivan* v. *Brooks et al.*, 10 Misc. Rep. 368; *Kafka* v. *Levensohn*, 18 Misc. Rep. 202; *Flanders* v. *Hammond*, 148 N. Y. 130.

Former trial.— On the trial it was proved that there had been a former trial between the same parties for the same cause of action. *Held*, that this fact, without proving such trial terminated, will not warrant the reversal of the judgment. *Merrill* v. *Whitehead*, 4 E. D. Smith, 239.

Leading questions.— The judgment will not be reversed on account of having allowed leading questions to witness, unless it is plain there has been an abuse of the discretion. *Seymour* v. *Bradfield*, 35 Barb. 49.

Neglect of the justice to deliberate upon the whole testimony.— Where there is a conflict of evidence the finding of the justice will not be disturbed, unless the evidence be of such convincing character as to lead to the conclusion that the justice has neglected through mistake to deliberate upon the whole testimony. *May* v. *Meierdieck*, 42 N. Y. St. Rep. 469; *Weiss* v. *Strauss*, 39 N. Y. St. Rep. 78; s. c., 14 N. Y. Supp. 776; *Dempsey* v. *Paige*, 4 E. D. Smith, 219.

Proof, supplying.— If a nonsuit is moved for defect in the evidence, the introduction of evidence which completes the proof by either party will cure the error of refusing to grant the motion at the time when it was made. *Kent* v. *Harcourt*, 33 Barb. 491; *Breidert* v. *Vincent*, 1 E. D. Smith, 542; *Barrick* v. *Austin*, 21 Barb. 241; *Lambert* v. *Seely*, 2 Hilt. 429; s. c., 17 How. Pr. 432.

Reasons of court below.— The appellate court, if impressed with the correctness of an order setting aside a verdict, is not confined, for the purpose of affirmance, to the reasons given by the justice at the trial, but must approve the decision if correct on any ground. *O'Gorman* v. *Teets*, 20 Misc. Rep. 359.

Variance between pleadings and proof.— Where no injustice has been done, there is no reason for reversing the judgment. *Briggs* v. *Evans*, 1 E. D. Smith, 192. See also *Rogers* v. *Verona*, 1 Bosw. 417. Nor will a judgment be reversed for errors in the complaint, although they are such as would have been good ground of objection if taken at the trial when such defects were supplied by the evidence, and no harm had been occasioned by them. *Mayor of New York* v. *Green*, 1 Hilt. 393.

GROUNDS FOR REVERSAL.

Amendment, refusal to allow. *King* v. *Donovan*, 26 Misc. Rep. 133, 55 N. Y. Supp. 876.

Contract; nonperformance; damages.— Where plaintiff seeks to recover on a contract on the theory of performance, which he fails to prove, and judgment is rendered in his favor for the whole claim, against objection, and the damage sustained by plaintiff by defendant's refusal to carry out the contract is not shown, judgment must be reversed. *Nicoll* v. *Lloyd*, 26 Misc. Rep. 799, 56 N. Y. Supp. 178.

Contradictory statement in return.— *Lees* v. *Pitney*, 27 N. Y. Supp. 972.

Counsel reading to the jury.— When counsel are permitted, under objection and exception, while summing up, to read to the jury an abstract from a pamphlet or newspaper, or to exhibit a cartoon, not in evidence, it is good ground for reversal. *Kalges* v. *Guardian Life Ins. Co.*, 57 N. Y. 638; *Williams* v. *Brooklyn Elevated Co.*, 126 N. Y. 96; *McKeever* v. *Weyen*, 11 Week. Dig. 258; *People* v. *Fielding*, 158 N. Y. 547.

Defendant not served with summons; judgment by default.— If the Appellate Term is not satisfied on the merits that the defendant has been served with the summons, it will reverse the judgment. *Empire, etc.* v. *Young*, 27 Misc. Rep. 226, 57 N. Y. Supp. 753.

Discontinuance of action, refusal to allow. *Goldberg* v. *Victor*, 26 Misc. Rep. 728, 56 N. Y. Supp. 1044.

Effect of reversal.— Where a judgment is reversed, without an award of judgment final for the defendant upon the merits, such reversal is not conclusive of the rights of the parties. *Ellert* v. *Kelly*, 10 How. Pr. 392; s. c., 4 E. D. Smith. 12. Where a judgment of nonsuit is rendered, which is reversed on appeal, the plaintiff must commence *de novo*. *Anonymous*, 9 Wend. 503. Where a judgment is subsequently reversed, upon technical grounds in no way involving the merits, this will not be a bar to a subsequent action for the same cause. *Onderdong* v. *Ranlett*, 3 Hilt. 323.

On the reversal of an order setting aside defendant's default, all the proceedings taken thereunder fall with it, and judgment for defendant rendered pending the appeal from the order must be reversed. *Weinberg* v. *Frank*, 25 Misc. Rep. 788, 56 N. Y. Supp. 920.

Evidence.— The court may review the evidence and reverse upon the facts. *Phillips* v. *Mumsey*, 22 N. Y. St. Rep. 226; *Macniffe* v. *Ludington*, 13 Abb. N. C. 407.

Id., illegal.— If the evidence is illegal, affects a material issue in the case, objection is taken, it is admitted, and judgment rendered against the party, it is good ground for reversing the judgment. *Williams* v. *Fitch*, 18 N. Y. 546; *Erben* v. *Lorillard*, 19 N. Y. 299; *Worrall* v. *Parmalee*, 1 N. Y. 519; *Wilmot* v. *Richardson*, 6 Duer. 329; *Murray* v. *Smith*, 1 Duer, 413; *Tuttle* v. *Hunt*, 2 Cow. 436; *Whiting* v. *Otis*, 1 Bosw. 420, 424; *Dresser* v. *Ainsworth*, 9 Barb. 619; *Ward* v. *Washington Ins. Co.*, 6 Bosw. 230; *Penfield* v. *Carpenter*, 13 Johns. 350; *Weber* v. *Kingsland*, 8 Bosw. 415, 443; *Hahn* v. *Van Doren*, 1 E. D. Smith, 411; *Main* v. *Eagle*, 1 E. D. Smith, 619, 620; *Belden* v. *Nicolay*, 4 E. D. Smith, 14, 17.

Id., improperly received, which may have influenced the judgment, and which was taken into consideration in finding the facts, cannot be disregarded, although there appears to be evidence in the cause which would have been sufficient to sustain the same finding, had the illegal testimony been rejected. *Belden* v. *Nicolay*, 4 E. D. Smith, 14; *Hahn*

v. *Van Doren*, 1 E. D. Smith, 411; *Main* v. *Eagle*, 1 E. D. Smith, 619. And see *Harper* v. *Leal*, 10 How. Pr. 276; *Martin* v. *Garrett*, 4 E. D. Smith, 346.

Id., rejected.— Though the court may be of opinion that evidence, which has been improperly rejected, would not have changed the verdict of the jury, yet, if it might have influenced their minds in considering the facts, and was competent, the appellate court is not at liberty to overlook the erroneous rejection. *McAllister* v. *Sexton*, 4 E. D. Smith, 41.

Where an appeal is based upon the ground of an improper rejection of competent testimony, the case must show clearly that there was an exception taken to such rejection or that the appellant was injured thereby. *Carey* v. *Carey*, 4 Daly, 270.

The exclusion of testimony offered to prove an affirmative defense on the ground defendant had failed to serve on plaintiff a bill of particulars not demanded upon a joinder of issue, nor until defendant sought to put in his evidence at the trial, is sufficient cause for reversal. *De Gregori* v. *Saitta*, 50 App. Div. 476, 64 N. Y. Supp. 10, 7 N. Y. Annot. Cas. 369.

Id., judgment against.— Positive testimony that a bill given in payment of the cause of action was counterfeit, met only by the testimony of the defendant that he has no recollection of paying the bill in question, presents a case where the justice decides against the evidence if he gives judgment for the defendant. *Baker* v. *Bonesteel*, 2 Hilt. 397.

Where the testimony establishing a case is direct, unequivocal, and consistent, the witnesses standing unimpeached and uncontradicted, justice or jury cannot unreasonably discredit them, and the judgment will be set aside as against evidence. *Jacks* v. *Darrin*, 3 E. D. Smith, 558; *Dolsen* v. *Arnold*, 10 How. Pr. 528, 532.

Id., preponderance of.— Reversal on the facts may be had only when the evidence presents such a preponderance in favor of the appellant that a contrary finding would be legal error. *Marvin Safe Co.* v. *Foss*, 44 N. Y. St. Rep. 130; s. c., 17 N. Y. Supp. 517, citing *Phillips* v. *Munsey*, 22 N. Y. St. Rep. 226; *Macniffe* v. *Ludington*, 13 Abb. N. C. 407.

Id., weight of.— In determining the weight it is proper to consider the quality of the evidence, the interest of the witnesses in the issue of the trial, and the compatibility and consistency of their several statements with the truth as it appears from attendant circumstances. *Schumacher* v. *Waring*, 7 Misc. Rep. 161; *Hirshkind* v. *Private C., B. & C. Assn.*, 12 Misc. Rep. 454.

In considering the weight of evidence the court will have due regard for the kind and quality of such evidence, the degree of credibility to which the testimony of witnesses is entitled, and the apparent probability or improbability of its truthfulness. *Brown* v. *Sullivan*, 1 Misc. Rep. 161; *Macniffe* v. *Ludington*, 13 Abb. N. C. 407; *Foxain* v. *Brown*, 3 N. Y. St. Rep. 608.

In an action for money alleged to have been loaned to the defendant to buy a suit of clothes, plaintiff testified to the fact alleged and was corroborated by his wife and another witness who testified to a promise by defendant to repay the loan. The defendant having denied the loan and without objection introduced evidence that about the time of the alleged loan he bought a suit of clothes and his uncle paid for it — *Held*, that the judgment for defendant would not be reversed as against the weight of evidence. *Siefke* v. *Siefke*, 5 Misc. Rep. 406, citing *Steffens* v. *Steffens*, 16 Daly, 363.

Judgment for plaintiff resting on his own testimony as to the amount to be paid to him for placing a loan,— *set aside*, on the testimony of defendant corroborated. *Kearney* v. *Alexander*, 58 N. Y. Supp. 1075.

Exception.— On appeal the Appellate Division may reverse without an exception, but will not do so unless the error goes to the substantial justice of the case. *Philips* v. *Hine*, 61 App. Div. 428, 70 N. Y. Supp. 593.

Furtherance of justice.— Although the appellate court will not reverse a judgment where there is conflicting evidence, yet it will review the evidence, and reverse the judgment, although the evidence as to the facts was conflicting, when the court is satisfied that justice has not been done. *Curley* v. *Tomlinson*, 5 Daly, 283. See also *Beebe* v. *Mead*, 33 N. Y. 587; *Peterson* v. *Rawson*, 34 N. Y. 370; *Smith* v. *Etna Life Ins. Co.*, 49 N. Y. 211; *Macniffe* v. *Luddington*, 67 How. 13; *Patterson* v. *Lichtenstein*, 9 Misc. Rep. 66; *Goodman* v. *Riccadonna*, 13 Misc. Rep. 66; *Pelletcau* v. *The U. S. L. Co.*, 13 Misc. Rep. 237.

On appeal, new trial ordered under *Curley* v. *Tomlinson*, 5 Daly, 283, on the ground that the ends of justice required it. *Jourdan* v. *Healy*, 46 N. Y. St. Rep. 198; s. c., 22 Civ. Proc. Rep. 157, 19 N. Y. Supp. 240. See also *Phillips* v. *Munsey*, 22 N. Y. St. Rep. 226; *Macniffe* v. *Luddington*, 12 Abb. N. C. 407.

Judgment after statutory time.— The failure of a justice to render judgment within the time (now fourteen days) after the cause is submitted to him renders the judgment a nullity. *Berrian* v. *Olmstead*, 4 E. D. Smith, 279; *Watson* v. *Davis*, 19 Wend. 371; *Wiseman* v. *Panama R. R. Co.*, 1 Hilt. 300.

If the last day falls on Sunday, judgment must be rendered on the day preceding; if it is not so done, the judgment will be erroneous. *Bissell* v. *Bissell*, 11 Barb. 96; *Ex parte Dodge*, 7 Cow. 147, 1 Wait's L. & Pr. 56, § 115, 2 Wait's L. & Pr. 694.

Time for decision.— A judgment rendered after the time limited by law, on the consent of the parties. *Lambert* v. *Solomon*, 28 App. Div. 562, 59 N. Y. Supp. 676.

If it appears from the record that the judgment was rendered more than eight (now fourteen) days after it was submitted, the return stating that it was rendered within eight (now fourteen) days must

be regarded as erroneous, and the judgment reversed as without jurisdiction. *Cohen* v. *Weill*, 32 Misc. Rep. 198, 65 N. Y. Supp. 695.

Jury trial.— Where the record shows that the defendant demanded a jury trial at the time of joining issue, a judgment rendered by the justice alone must be reversed, as the justice has no power to deprive the defendant of his statutory right to a jury trial. *Rubenstein* v. *Silberfeld*, 24 Misc. Rep. 201, 52 N. Y. Supp. 703.

Negligence.— Complaint dismissed, on the sole ground that the defendant was not guilty of negligence; the court will reverse the judgment, if erroneous on this point, and will not pass upon the question which was not passed on below, whether plaintiff was not also guilty of contributory negligence. *Kinniell* v. *Burfeind*, 2 Daly, 155.

Misstatements.— On the day to which the action was adjourned the justice was engaged in the trial of a cause. Upon the statement that the defendant did not intend to appear, he suspended trial, and took testimony and rendered judgment in the adjourned case. Shortly thereafter the defendant appeared for the purpose of trying the cause. *Held*, that the judgment should be reversed, in consequence of misstatements to the justice by the plaintiff. *Beach* v. *McCann*, 1 Hilt. 256; s. c., 4 Abb. Pr. 18. See also *Armstrong* v. *Craig*, 18 Barb. 387.

Person not an attorney trying case.— Where a judge of a District Court knowingly permits a person who is not an attorney and counselor-at-law to conduct a cause before him to the end, he is guilty of a misdemeanor and the judgment will be reversed. *Newburger* v. *Campbell*, 58 How. 313, 9 Daly, 102.

Proofs.— The judgment must be sustained by the proofs, whether defendant appears or not. *Alburtis* v. *McCready*, 2 E. D. Smith, 39; *Babcock* v. *Raymond*, 2 Hilt. 62; *Howard* v. *Brown*, 2 Hilt. 247. The amount of damages on breach of contract must be sustained by competent evidence in the return, not upon a mere estimate. *Ely* v. *O'Leary*, 2 Hilt. 355.

A judgment must be supported by proof, and cannot rest upon qualified admissions made by defendant's counsel and upon stipulation made between the attorneys, whose conditions were not fully performed. Judgment reversed. *Cooper* v. *Kanter*, 24 Misc. Rep. 203; s. c., 52 N. Y. Supp. 625.

The action was dismissed on the ground that the copy summons served did not contain the date of the return, but the record not showing that the paper purporting to be a copy was served at all, and it appearing from the return and affidavit of the marshal, and the affidavit of plaintiff's attorney that a copy of the summons was personally served, which was not traversed,— *Held*, that the judgment should be reversed. *Caldwell* v. *De Korven*, 66 N. Y. Supp. 309.

Statute of limitations.— The defense of the statute of limitations can only be waived by an express consent to waive it; and although not

referred to on the trial, nor in the summing up, and it escapes the notice of the justice until after he had rendered judgment, yet, on appeal, if it appear that the defense was sustained by the evidence, the judgment will be reversed. *Penfield* v. *Jacobs*, 21 Barb. 335.

REARGUMENT.

See Rule IV of the Supreme Court for the Appellate Term, to be found on p. 434, as to what must be shown on a motion for a reargument, and how it is heard. See *Mount* v. *Mitchell*, 32 N. Y. 702; *Curley* v. *Tomlinson*, 5 Daly, 283.

Reargument may be had, although judgment of affirmance had been entered upon the decision on the previous hearing, if the return has not been remitted to the court below. *St. Michael's Prot. Esp. Ch.* v. *Behrens*, 13 Daly, 548.

An affidavit which merely shows that, on the first hearing, the counsel for the appellant was not duly prepared to argue the cause, and therefore entertains the belief that the court did not fully understand the questions involved in the case is insufficient. *Drucker* v. *Patterson*, 2 Hilt. 135. A rehearing will not be granted where the court is satisfied that a hearing would lead to the same result. *Teag* v. *Chrystie*, 2 Abb. Pr. 259. See also *Heald* v. *MacGovern*, 25 N. Y. St. Rep. 579; *E. T. Co.* v. *E. B. Co.*, 34 N. Y. St. Rep. 315; *Poole* v. *Harris*, 28 N. Y. St. Rep. 170; *People ex rel. Ward* v. *Purroy*, 45 N. Y. St. Rep. 49; *Norlinger* v. *Levine*, 45 N. Y. St. Rep. 52; *Compton* v. *Heissenbuttel*, 45 N. Y. St. Rep. 102.

LEAVE TO APPEAL TO THE APPELLATE DIVISION OF THE SUPREME COURT.

An application to appeal to the Appellate Division is provided for and regulated by Rule VII of the Supreme Court for the Appellate Term. (To be found on p. 435.)

When application should be made.— An appeal should be allowed by order duly entered, before the end of the next term, after which the judgment sought to be appealed from was entered. It is sufficient if the application of the party desiring the appeal is made and heard during that term: and though the court do not decide upon the application till a subsequent term, they may then order the application to be allowed, and the order entered as of the proper term. *Clapp* v. *Graves*, 9 Abb. Pr. 21; *Smith* v. *White*, 23 N. Y. 160.

What must be shown.— An application for leave to appeal must state the question of law it desired to have reviewed, and that question must be one not only of importance but which has never been adjudicated by the Court of Appeals. *White* v. *Balta*, 7 Misc. Rep. 662.

The grounds for such an application must show either that the construction of a public statute is involved; that questions of law are of public importance, or affect large interests; that the principles involved are of importance to others, or that a number of cases depend upon the decision of the case at bar. *Spofford* v. *Rowan*, 6 N. Y. St. Rep. 273.

Where the decision upon a question presented is in direct conflict with a decision of the appellate court, a proper case is shown for granting leave to appeal. *Clapp* v. *Graves*, 2 Hilt. 243.

Leave will be granted when questions arise that should be determined by the court of last resort, such as to determine the *situs* of the plaintiff's claim, the power of the Legislature of another State to alter the right of a resident of this State, and whether a resident of this State should be permitted to reach property exempt by the laws of this State from execution by suing a resident of this State in the courts of another State. *Dealing* v. *N. Y., N. H. & H. R. R. Co.*, 8 N. Y. St. Rep. 386.

Leave to appeal will not be granted where the question decided relates only to practice, and a case involving the same question has been previously permitted to be taken to the appellate court (*Palmer* v. *Moeler*, 2 Hilt. 421), where the testimony objected to on the trial could not have prejudiced the party excepting. *Lee* v. *Price*, 8 N. Y. St. Rep. 258.

Where the court was of opinion that the claim of the plaintiff (which had been rejected) was of a character scarcely escaping what is denominated as "lobby services"— *Held* to be a good ground for refusing the plaintiff leave to appeal. Where the determination of a suit depends upon the construction of a written instrument, leave to appeal will not be granted where there is no dissent among the judges, and where there is no question of general interest or public importance involved. *Annan* v. *Ritchie*, 6 Daly, 331. Where there is a diversity of opinion and practice upon certain points raised upon the appeal, if the decision of those points was not necessary to its determination (although passed upon by the court), and the decision was placed upon a ground that had been passed upon by the Court of Appeals in a reported and well-known case (*Josuez* v. *Murphy*, 6 Daly, 404); where the case is a peculiar one, and not likely to be of frequent occurrence. *Constant* v. *Barrett*, 14 Misc. Rep. 570.

LEAVE TO APPEAL TO THE COURT OF APPEALS.

This is regulated by section 191, Code of Civil Procedure.

In action removed and appeal therein, leave to go to the Court of Appeals was still required to be obtained. *Smith* v. *White*, 29 N. Y. 572; *Salter* v. *Parkhurst*, 2 Daly, 240.

RULES FOR THE HEARING OF APPEALS.

By authority of Laws of 1895, chap. 553, § 15, the justices of the Appellate Division have made the rules and regulations for the hearing of appeals from this court as follows:

FIRST JUDICIAL DEPARTMENT IN THE BOROUGHS OF MANHATTAN AND THE BRONX.

Rule I. There shall be a term of the Supreme Court for the hearing of appeals from the Municipal Court of the city of New York, in the boroughs of Manhattan and The Bronx, which shall commence on the first Monday of October, December, February, April, and June in each year, at half-past ten A. M., and shall continue from day to day during each of said months, until all appeals ready for hearing are heard and disposed of. The court shall hold its sessions in the courthouse in the county of New York, and it shall be held by three justices of the Supreme Court, duly designated to hold such term.

Rule II. The clerk of such term of the Supreme Court shall make up a calendar of all appeals to be heard at each term, and publish the same in *The Law Journal* at least five days before the commencement of the term. No appeal shall be placed upon such calendar unless the return from the court below is duly filed with the clerk of such term at least eight days before the commencement of the term. Upon such return being filed as aforesaid the clerk shall place the appeal upon the calendar in the order in which the return was filed. The order of the court shall be annexed to the return and filed in the office of the county clerk. Appeals shall be brought on for argument upon notice of eight days.

Rule III. If the appellant does not procure the return to be made to the court within the time prescribed in section 3053 of the Code of Civil Procedure, the respondent may move, on five days' notice, to dismiss the appeal, and such appeal will be dismissed unless such Appellate Term, for good cause shown, extends the time in which the return may be filed. If the court below shall not make the return to this court, as prescribed by the Code, the appellant may move, on the first day of such Appellate Term, upon five days' notice to the attorney for the respondent, and to the trial justice, to compel such return by attachment. All other motions to dismiss an appeal shall be made on five days' notice on the first day of an Appellate Term.

Rule IV. Motions for reargument will only be heard on notice to the adverse party, at the next succeeding term after the decision; such notice must state briefly the ground upon which the reargument is asked, and such motions must be submitted on printed briefs stating concisely the points supposed to have been overlooked or misapprehended by the court, with proper reference to the particular portion of the case and

the authorities relied upon, together with copies of the opinions, if any, and counsel will not be heard orally.

Rule V. In the argument of the appeal, not more than fifteen minutes shall be occupied by counsel on either side, except by express permission of the court.

Rule VI. If the appellant does not appear upon the call of the calendar, the judgment or order appealed from shall be affirmed. If the appellant appears and the respondent fails to appear, the appellant may either argue or submit his case, but judgment of reversal by default will not be allowed.

Rule VII. An application to appeal to the Appellate Division of the Supreme Court from a determination of the Appellate Term, under section 1344 of the Code of Civil Procedure, must be made in writing on notice to the adverse party upon the first day of the term following the term in which the case was decided; and such application must set forth in full the special reasons why such an appeal should be allowed, and must be submitted without oral argument.

Rule VIII. All motions may be made under Rule III upon a notice of five days. Proof of service of such notice must be filed with the clerk, together with a note of issue, on the Friday preceding the commencement of the term. In all other cases, whether the motion be founded upon regular notice or an order to show cause, proof of service of the notice or order, together with a note of issue, must be filed with the clerk on the same day. The motion calendar will be published on the Saturday preceding the commencement of the term, but no motion will be placed thereon, except upon compliance with this rule. Appeals will be disposed of in their order upon the calendar. If either party be not ready to argue the case orally when called for argument, he must submit, or the case for cause shown be ordered to stand over until the next term. Proposed orders must be presented for settlement on a notice of two days. Every order containing a provision for a new trial must specify the time and place of the new trial ordered in accordance with the provisions of section 3065 of the Code of Civil Procedure.

Second Judicial Department in the Boroughs of Kings, Queens, and Richmond.

All appeals from judgments rendered in the Municipal Court of the city of New York on or after the 15th day of November, 1898, in districts embraced within the Second Judicial Department, will be heard by the Appellate Division of the Supreme Court for said department. A special calendar for such appeals will be made up for the second Friday of each term of this court, on which day a hearing of said appeals will be had. Either party may bring such an appeal on for hearing by a notice of argument, served at least eight days prior to the day designated for the hearing of the appeal. Upon the return day of said

notice the respondent may, upon the default of his adversary or his failure to cause the return of the Municipal Court to be filed with the clerk of this court, as prescribed by these rules, take a judgment of affirmance or an order dismissing the appeal as the justice of the case may require; and it shall not be necessary to make a special motion for the dismissal of any appeal. In case of a failure of any justice of the Municipal Court to make return to this court, as required by section 3053, Code of Civil Procedure, it shall be the duty of the appellant to forthwith apply to this court, under the provisions of sections 3055 and 3056, to compel such return.

Upon the filing of any return of a justice of the Municipal Court, and upon a note of issue filed by either party, at least three days before the day for hearing said appeals, it shall be the duty of the clerk to put the appeal on the calendar.

The appellant shall furnish the court either a certified or stipulated copy of the return in typewriting, or, at his election, printed copies of the return, and each party shall file five copies of any brief or points which he may desire to submit.

The certified or stipulated copy of the return and brief or points must be filed the day before the cause is placed on the day calendar.

NOTE.— There are no sections 328 and 329.

TITLE X.

Costs and Fees.

SECTION 330. When prevailing party to recover costs.
331. When neither party to recover costs.
332. Costs; sums allowed.
333. When defendant entitled to increased costs.
334. Costs on demurrer.
335. Costs on amendment of pleading.
336. Costs on adjournment.
337. Costs after discontinuance, upon answer of title.
338. Costs where title to real property, in question.
339. Costs in actions upon bastardy, et cetera, bonds.
340. Costs in action by working woman.
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SECTION 349. Fees, property of city.
350. Fees on judgment, in county clerk's office.
351. Jurors' fees.
352. Witnesses' fees.
353. Stenographers' fees.
354. Marshals' fees.
355. Costs on order to prosecute marshal's bond.
356. Fees in summary proceedings.

§ 330. **When prevailing party to recover costs.**— Except as specifically prescribed by law, a party who recovers judgment in this court is entitled to recover as costs all sums allowed by express provision of law, and all fees and disbursements prescribed by law for services necessarily rendered in an action at the request of the prevailing party, and paid by him.

Notes to section 330.

This section is taken from section 3074 of the Code of Civil Procedure, relating to justices' courts.

For tabulated statement of "Costs and Fees," see notes following § 356.

Abandonment or bastardy bond actions.— In addition to the other costs in these actions the court shall make and the clerk shall enter on the judgment an additional allowance of ten per cent. on the amount recovered. § 339 of this act. See notes to §§ 1 and 178, subd. 4, as to the jurisdiction of this court upon such bonds.

Adjournment.— Costs on, may be imposed by the justice as he deems reasonable. § 336.

Amendment.— Court may impose, in its discretion, as a condition of an amendment, the payment of costs to the adverse party not exceeding $10. § 335.

Amount.— Where a defendant procures a discontinuance upon the ground that the accounts of the parties exceed $400, and plaintiff thereupon brings an action in the Supreme Court and recovers less than $50, defendant is estopped from claiming that the justice had jurisdiction, and so that he is entitled to costs. *Bradner* v. *Howard*, 75 N. Y. 417, affg. 14 Hun, 420.

Appeal.— For costs on appeal, see §§ 345 and 346.

Attorney must have filed verified pleading, or a written notice of appearance to recover costs. See § 332.

Id.— Costs belong to the attorney and cannot be made the subject of set-off between the parties. *Husted* v. *Thomson*, 26 Misc. Rep. 548, 57 N. Y. Supp. 558.

Id., who is party, appearing in person.— A plaintiff who is an attorney-at-law may recover extra costs, although he himself conducts the prosecution of the case. *Kopper* v. *Willis*, 9 Daly, 460.

An attorney who issued and appears *in propria persona*, and succeeds in the action, is entitled to the same costs as if he had appeared as attorney for another. *Crommelin* v. *Dinsmore*, 1 City Ct. Rep. 69.

Id.; lien for costs.— See authorities under § 40.

"Costs," meaning of term.— The term "costs" generally includes disbursements of all kinds in the action, and not merely those fixed sums which are allowed as a compensation for the labor of the party or his attorney. *Wheeler* v. *Westgate*, 4 How. 269; *Belding* v. *Conklin*, 4 How. 196; *Stone* v. *Duffy*, 3 Sandf. 761.

Department of health.— In case of recovery for less than $50, the amount of costs shall be $10. If no recovery by the board of health, the judge shall certify in writing that there was not reasonable cause for bringing the action, and in such case the costs shall not exceed $10 unless the amount claimed exceed $50. Charter, §§ 1262 and 1287.

Former action; costs unpaid; stay.— A subsequent action cannot be brought while the costs, due in a prior action for the same subject-matter, which action has been discontinued with costs, remain unpaid. Objection that costs of the former action had not been paid must be made on return of summons and before complaint entered, and certainly before defendant answers. *Flewelling* v. *Brandon*, 4 Daly, 333. See also *Hepburn* v. *Hepburn*, 54 How. 466.

A former suit is still pending until the costs therein are paid (*Averill* v. *Patterson*, 10 N. Y. 500), and this rule applies to this court. *Flewelling* v. *Brandon*, 4 Daly, 333.

Where the costs of dismissal of a previous action for the same cause between the same parties are paid by the plaintiff on the return day of the summons, the defendant is not entitled to have the plaintiff's proceedings stayed, or his complaint dismissed by reason of the nonpayment of such costs, before beginning the second action. *Lewis* v. *Davis*, 8 Daly, 185.

Guardian ad litem.— Responsibility for costs. See § 41.

Jurisdiction, want of.— The rule that costs will not be allowed on the dismissal of a complaint for want of jurisdiction applies only in cases where the want of jurisdiction appears on the face of the summons or complaint, or the court is called upon to adjudicate the question on plea or demurrer. *Harriott* v. *N. J. R. R. T. Co.*, 1 Daly, 377; *Gormley* v. *McIntosh*, 22 Barb. 271.

Where the court proves to have no jurisdiction of an action, it may nevertheless award costs against plaintiff, since he has submitted himself to the jurisdiction. *Day* v. *Sun Ins. Office*, 40 App. Div. 305, 57 N. Y. Supp. 1033.

Marshal.— The costs of motion, not exceeding $10, for leave to prosecute the bond shall be included in the judgment which shall be obtained. § 355.

Mechanic's lien action.— The costs and disbursements are the same as allowed in other actions in this court. Code Civ. Proc., § 3411.

Offer.— Upon the acceptance by plaintiff in replevin of defendant's offer of judgment for the recovery of a specified chattel and $2 damages for its detention, with costs, plaintiff is entitled to but $2 costs, though he demands that the value of the chattels sued for be fixed at $200, and damages for their detention at $100. *Hausauer* v. *Machawicz*, 54 App. Div. 23, 66 N. Y. Supp. 340.

Motion costs to be included in the judgment; offset.—When motion costs are granted, they are to be included in the judgment, if in favor of the party who succeeds at the trial, or if in favor of the party defeated, offset against the costs of the successful party. *Faber* v. *Flauman*, 30 Misc. Rep. 627, 62 N. Y. Supp. 784.

Poor person.— Section 461 of the Code of Civil Procedure construed as to payment of costs accrued prior to application. Such costs must be paid. *Lyons* v. *Murat*, 4 Abb. Pr. N. S. 13. See §§ 45, 53.

While a petition for leave to sue as a poor person, which alleges the facts upon which the action is to be brought, and the poverty of the plaintiff makes out a *prima facie* case, yet if the order obtained *ex parte* is challenged, a meritorious cause of action must be shown, and on this question the dismissal of a previous suit may be considered, though the statute prescribes that nonpayment of the costs awarded against the plaintiff therein shall not preclude another action. *Young* v. *Nassau Electric R. R. Co.*, 34 App. Div. 126, 54 N. Y. Supp. 600.

Res adjudicata; dismissing an action.— A judgment, dismissing an action on the ground of want of jurisdiction, is *res adjudicata* as to plaintiff's right to costs in an action for the same cause in a court of record, where his recovery is less than $50. *Kirk* v. *Blashfield*, 4 Hun, 269.

Workingman.— For costs in action by, see § 340.

§ 331. **When neither party to recover costs.**— In either of the following cases, costs shall not be awarded to either party, but each party must pay his own costs.

1. Where the action is dismissed by reason of the failure of both parties to attend.

2. Where the defendant interposes an answer that title to real property will come in question, and gives the undertaking thereon prescribed in this act.

3. Where the action is discontinued on the ground that the plaintiff or defendant is an infant, for whom a guardian ad litem has not been appointed.

4. Where the defendant interposes plea of bankruptcy.

Notes to section 331.

This section is taken from section 3075 of the Code of Civil Procedure, relating to justices' courts.

Answer of title to real property.— Defendant to give undertaking. See § 180.

Building Code.— Action to recover penalty for violation of this Code. Department of buildings, or any officer thereof, or the corporation of the city of New York, or any defendant, not liable for costs, unless specially ordered, etc. § 151, Building Code; Thomson's Greater New York Charter, p. 1039.

Fire commissioner.— No fees or costs shall be demanded of him in an action to recover a penalty. Charter, § 773, until changed by the board of aldermen.

§ 332. **Costs; sums allowed.**— In all actions brought in this court there shall be allowed to the prevailing party, if he shall have appeared by an attorney at law, who files a verified pleading, or a written notice of appearance, the following sums as costs. Where an action is removed as provided in section three of this act, costs shall be allowed the same as if the action had been commenced in the court to which it is removed.

1. **To either party.**— Where the amount demanded in the summons is under fifty dollars, or where the amount demanded is under fifty dollars and defendant interposes a counterclaim under fifty dollars, the court may, in its discretion, award a sum not exceeding five dollars.

2. **To the plaintiff.**— Where after the trial of an issue of fact raised by appearance and answer of defendant, plaintiff recovers judgment: For fifty dollars and under one hundred dollars, ten dollars; for one hundred dollars and under two hundred dollars, fifteen dollars; for two hundred dollars and under three hundred dollars, twenty dollars; for three hundred dollars and under four hundred dollars, twenty-five dollars; for four hundred dollars or over, thirty dollars. If

the action is for the recovery of a chattel the amount of costs shall be governed by the value of the chattel as determined in the judgment.

3. **To the plaintiff.**— Where, upon the nonappearance, or failure of defendant to answer, plaintiff recovers judgment: For fifty dollars and under one hundred dollars, five dollars; for one hundred dollars and under two hundred dollars, seven dollars and fifty cents; for two hundred dollars and under three hundred dollars, ten dollars; for three hundred dollars and under four hundred dollars, twelve dollars and fifty cents; for four hundred dollars or over, fifteen dollars. If the action is for the recovery of a chattel the amount of costs shall be governed by the value of the chattel as determined in the judgment.

4. **To the plaintiff.**— Where the action brought by the plaintiff is for a sum less than fifty dollars, and the defendant shall have interposed a counterclaim amounting to fifty dollars or over, and the plaintiff recovers judgment upon the nonappearance of defendant, the same sum as plaintiff would be entitled to recover on default if the amount of his claim was the amount of defendant's counterclaim.

5. **To the defendant.**— Where defendant recovers judgment after the trial of an issue of fact, raised by appearance and answer, costs shall be awarded to the defendant, at the rate prescribed in subdivision two based upon the amount of plaintiff's demand in the summons. If the action is for the recovery of a chattel, the amount of costs shall be governed by the value of the chattel, as set forth in the affidavit of plaintiff.

6. **To the defendant.**— Where defendant recovers judgment on the non-appearance of the plaintiff, costs shall be awarded to the defendant at the rates prescribed in subdivision three, based upon the amount of plaintiff's demand in the summons. If the action is for the recovery of a chattel the amount of costs shall be governed by the value of the chattel as set forth in the affidavit of plaintiff.

7. **To the defendant.**— Where after the trial, of an issue of fact, raised by his appearance and answer, and counterclaim, the defendant recovers judgment: For fifty dollars

and under one hundred dollars, ten dollars; for one hundred dollars and under two hundred dollars, fifteen dollars; for two hundred dollars and under three hundred dollars, twenty dollars; for three hundred dollars and under four hundred dollars, twenty-five dollars; for four hundred dollars or over, thirty dollars.

8. **To the defendant.**— Where, upon the non-appearance of the plaintiff after issue joined and defendant shall have interposed a counterclaim and recovers judgment: For fifty dollars and under one hundred dollars, five dollars; for one hundred dollars and under two hundred dollars, seven dollars and fifty cents; for two hundred dollars and under three hundred dollars, ten dollars; for three hundred dollars and under four hundred dollars, twelve dollars and fifty cents; for four hundred dollars or over, fifteen dollars.

9. Upon settlement of case after service of summons, and before trial, plaintiff shall be entitled to costs at the rate prescribed in subdivision three of this section, determined by the amount of the settlement.

10. Upon settlement of case after trial and before entry of judgment plaintiff shall be entitled to costs at the rate prescribed in subdivision two of this section, determined by the amount of the settlement.

Notes to section 332.

This section is new and is based upon the general principle of costs relating to justices' courts, with a graduated scale. It is taken, among others, principally from section 1417 of the Consolidation Act (Laws 1882, chap. 410), which was taken from Laws 1857, chap. 344, § 68, as amended by Laws 1868, chap. 308, and from Laws 1857, chap. 295, §§ 7 and 8; Laws 1870, chap. 741, § 4, and section 1420 of the Consolidation Act, which was originally Laws 1857, chap. 344, § 70.

It will be observed that costs are only allowed to the prevailing party "if he shall have appeared by an attorney, *who filed a verified pleading or a written notice of appearance.*"

Costs only to an attorney.— Plaintiff recovering judgment is not entitled to costs, where it does not appear that he had an attorney actually engaged in the prosecution of the action. *Bacon* v. *Combes*, 65 N. Y. Supp. 510.

Trial has been had where the defendant's attorney cross-examines the plaintiff with a view to defeat his recovery, and $5 costs may be allowed. *Ncallis* v. *Meyer*, 21 Misc. Rep. 344.

§ 333. **When defendant entitled to increased costs.**— In either of the following cases, a defendant in whose favor a final judgment is rendered, in an action wherein the complaint demands judgment for a sum of money only, or to recover a chattel; or a final order is made, in a special proceeding instituted by a state writ, is entitled to recover the costs, prescribed in section three hundred and thirty-two of this act, and, in addition thereto, one-half thereof:

1. Where the defendant is or was a public officer, appointed or elected under the authority of the state, or a person specially appointed, according to law, to perform the duties of such an officer; and the action or special proceeding was brought by reason of an act, done by him by virtue of his office, or an alleged omission by him, to do an act, which it was his official duty to perform.

2. Where the action was brought against the defendant, by reason of an act done, by the command of such an officer or person, or in his aid or assistance touching the duties of the office or appointment.

3. Where the action was brought against the defendant, for taking a distress, making a sale, or doing any other act, by or under a color of authority of a statute of the state.

But this section does not apply, where an officer, or other person, specified herein, unites in his answer with a person not entitled to such additional costs.

Note to section 333.

This section is the same as section 3258 of the Code of Civil Procedure, relating to justices' courts. See also at the end of § 356, tabulated costs, etc.

§ 334. **Costs on demurrer.**— Where a judgment is rendered on the trial of a demurrer, the prevailing party shall recover the same costs as if the judgment had been in his favor, upon the default in the same action. Otherwise costs shall

not exceed ten dollars in the discretion of the justice, as a condition for leave to plead over.

Note to section 334.

This section is taken from section 3077 of the Code of Civil Procedure, relating to justices' courts. See tabulated statement of costs at the end of § 356.

§ 335. **Costs on amendment of pleading.**— The court may, in its discretion, as a condition for allowing an amendment to a pleading, require the payment of a sum not to exceed ten dollars as costs to the adverse party.

Note to section 335.

This section is taken from section 2944 of the Code of Civil Procedure, relating to justices' courts, made applicable to this court by section 1347 of the Consolidation Act (Laws 1882, chap. 410).

§ 336. **Costs on adjournment.**— When a trial shall be adjourned on cause shown, the justice, in his discretion, may impose upon the party applying for the adjournment such conditions as to him shall seem reasonable, and may also impose costs to the amount of ten dollars, besides disbursements, as a condition of adjournment.

Notes to section 336.

This section is taken from sections 1365 and 1420, subdivision 3, of the Consolidation Act (Laws 1882, chap. 410), which originally were Laws 1857, chap. 344, §§ 28 and 70.

Trial; nonpayment of costs.— Costs may be imposed as a condition of granting an adjournment to defendant, but their nonpayment will not preclude him from participating in the trial on the adjourned day. *Farber* v. *Flauman*, 30 Misc. Rep. 627, 62 N. Y. Supp. 784, 7 N. Y. Annot. Cas. 267.

§ 337. **Costs after discontinuance, upon answer of title.**— When an action brought in this court, has been discontinued, as prescribed in this act, upon the delivery of an answer showing that title to real property will come in question, and a new action for the same cause has been commenced

in the proper court; the party in whose favor final judgment is rendered in the new action, is entitled to costs; except that where final judgment is rendered therein, in favor of the defendant, upon the trial of an issue of fact, he is not entitled to costs, unless it is certified that the title to real property came in question on the trial.

Notes to section 337.

This section is taken from section 1421 of the Consolidation Act (Laws 1882, chap. 410), which was taken from section 3235 of the Code of Civil Procedure, applicable to justices' courts. See also §§ 182 and 338.

Dismissal of complaint.— The plaintiff discontinued an action, brought for a trespass upon lands, upon a plea of title and a general denial being interposed by the defendant. Thereafter he brought this action for the same cause, and the same defenses were again pleaded. Upon the trial, the plaintiff having given no evidence to prove the trespass alleged in the complaint, the court, on motion of the defendant, dismissed the complaint. *Held*, that there was no "trial of an issue of fact," within the meaning of those terms as used in the exception contained in section 3235, and that defendant was entitled to *costs*. *Gates* v. *Canfield*, 28 Hun, 12, 64 How. 81, 15 Week. Dig. 389, revg. 2 Civ. Proc. Rep. 254.

New action.— As to costs in new suit when original action had been dismissed on the ground that title to real estate would come in question, see *Locklin* v. *Casler*, 50 How. 43.

An action to recover the expense of building the defendant's portion of a division fence between the adjoining lands of the parties was commenced and discontinued upon defendant's objection as involving the title to real estate. On the trial of the action afterward commenced in the Supreme Court, it appeared that there was no dispute as to the location of the division line where the fence was to be placed; but that the question litigated was whether the fence was or was not upon the line. *Held*, that the title to real property did not come in question on the trial. That the plaintiff was entitled to *costs* under section 3235. *Collins* v. *Adams*, 19 N. Y. St. Rep. 48.

On offer by defendant.— Where the defendant before answering offered to allow judgment against him for a certain sum, and upon plea of title the action was discontinued and brought in the Supreme Court,— *Held*, that the action here was identical with that in the justice's court, and the defendant entitled to costs on recovery by the plaintiff of less than the sum offered. *The Niagara Falls Suspension Bridge Co.* v. *Backman*, 4 Lans. 523.

§ 338. **Costs where title to real property in question.**—Where plaintiff's complaint is dismissed, pursuant to section one hundred and eighty-four of this act, defendant shall be entitled to recover the costs provided in subdivision two of section three hundred and thirty-two of this act.

Notes to section 338.

This section is taken from sections 1354 and 1421 of the Consolidation Act (Laws 1882, chap. 410).

Section 1354 of the Consolidation Act is the same as section 2956 of the Code of Civil Procedure, relating to justices' courts, and section 1421 of the Consolidation Act was taken from section 3235 of the Code of Civil Procedure, also applicable to justices' courts.

The amount of costs is specifically fixed as provided in section 332.

Section 184 is entitled "Title appearing from plaintiff's own showing." See also §§ 182 and 337.

Recovery under $50.—Where the recovery is less than $50 in the higher court, the plaintiff is still entitled to costs where there is no certificate of the court that title to real property came in question on the trial. *Blake* v. *James*, 19 How. 321.

Where the defendant pleaded title, and upon removal succeeded on the same issues as to which such title was pleaded, plaintiff upon recovery of six cents on other issues is not entitled to costs. *Shufelt* v. *Sweet*, 15 Week. Dig. 1.

In an action for trespass defendant pleaded title to a portion of the premises; that action was thereupon discontinued and one commenced in the Supreme Court, wherein the pleadings were substantially the same. Defendant succeeded on the issues affecting the premises as to which title was pleaded. Neither possession of nor the title to the residue was made a question upon the trial by defendant, and the amount of the recovery for trespass thereon was less than $50. *Held*, that under section 61 of the Code, the costs in such case are to be governed by the decision and judgment on the issue presented by the plea of title; that plaintiff, by claiming title to land not owned by him, caused all the costs which accrued in the Supreme Court; he therefore could not recover costs, but was properly chargeable with defendant's. *Morss* v. *Salisbury*, 48 N. Y. 636.

§ 339. **Costs in action upon bastardy, et cetera, bonds.**—Upon a recovery being had in an action brought upon a bastardy or abandonment bond, by the commissioner of public charities, or the overseers of the poor, in addition to the other costs therein, the court shall make and the clerk shall

enter in the judgment, an additional allowance of ten per centum of the amount recovered.

Notes to section 339.

This section is the same as section 1422 of the Consolidation Act (Laws 1882, chap. 410), which was taken from section 2, chapter 389, Laws 1862.

See note to § 1, subd. 4, as to whether this court has jurisdiction in an action upon a bastardy or abandonment bond. See also § 178 and notes.

§ 340. **Costs in action by working woman.**— In an action brought to recover a sum of money for wages earned by a female employee, other than a domestic servant; or for material furnished by such an employee, in the course of her employment, or in or about the subject-matter thereof, or for both, the plaintiff, if entitled to costs, recovers the sum of ten dollars as costs, in addition to the costs allowed in this court, unless the amount of damages recovered is less than ten dollars; in which case, the plaintiff recovers the sum of five dollars as such additional costs. When the employee is the plaintiff in such an action, she is entitled upon a settlement thereof, to the full amount of costs, which she would have recovered, if judgment had been rendered in her favor, for the sum received by her upon the settlement.

Notes to section 340.

This section is the same as section 1424 of the Consolidation Act (Laws 1882, chap. 410), which was taken from sections 3131 and 3222 of the Code of Civil Procedure.

Who is not an employee?—Appellant, who was paid for the various items of service performed by her for defendants, and not receiving a stated salary, and who conducted her work in a room hired by herself at her own expense and who hired and paid her assistants,—*Held* not an employee entitled to extra costs under section 1424 of the Consolidation Act, and under Code Civ. Proc., §§ 3131, 3222, or to execution against the person under section 3221. *Berger* v. *Mandel*, 25 Misc. Rep. 766, 54 N. Y. Supp. 987.

§ 341. **Taxation of costs.**— Where judgment has been rendered by the justice, costs must be taxed by the clerk and

inserted in the judgment. Before any item of costs other than the costs fixed by the express provision of law or granted by the justice or fees paid to the clerk in the action are allowed, the party must show by his affidavit, or that of his attorney, that the item was actually and legally paid and incurred. All items of cost must be entered by the clerk in the docket book kept by him. The clerk shall likewise tax costs allowed by the appellate court.

Notes to section 341.

This section is new and is taken partly from section 3078 of the Code of Civil Procedure, relating to justices' courts.

Costs on appeal.— See §§ 345 and 346; they are to be taxed by the clerk of this court by this section.

Taxation by the court; marshal's fees, etc.— Fees of marshal for trouble and expenses in taking possession of and preserving property replevied were formerly left to the discretion of the justice under Consolidation Act, § 1711 (*Stewart* v. *The Fidelity, etc.*, 19 Misc. Rep. 419); but now they are taxed by the court. See § 104.

Trial fee cannot be recovered back from the clerk.—Where a verified answer has been filed in this court and the issue adjourned, and when called for trial, defendant defaults and plaintiff proves his case, this amounts to a trial for purposes of costs, and plaintiff cannot recover back the trial fee paid to the clerk. *People ex rel. Kemper* v. *Wilson*, 34 Misc. Rep. 273, 68 N. Y. Supp. 850.

Tabular statement of costs and fees.— See end of § 356.

§ 342. **Review of taxation.**— A taxation may be reviewed by the justice sitting in the district, within five days after the entry of judgment, upon two days' notice. The order made upon such a motion must disallow any item wrongfully included in the judgment, or add any item wrongfully omitted therefrom, and direct that any sum so disallowed be credited upon the judgment and upon any execution or other mandate issued to enforce the judgment. Unless such review is asked for, such taxation shall not be thereafter questioned on appeal.

Note to section 342.

This section is new and is taken from sections 3262 to 3265 of the Code of Civil Procedure, relating to justices' courts.

§ 343. **Costs; duty of clerk on taxation.**— The clerk must examine all items presented to him for taxation; must satisfy himself that all the items allowed by him are correct and legal; and must strike out all charges for fees, where it does not appear that the services for which they are charged were necessarily performed.

Notes to section 343.

This section is taken from section 3266 of the Code of Civil Procedure. By section 341 the clerk of this court must tax the costs on appeal.

Prospective charges and fees on docket in county clerk's office. See § 350.

§ 344. **Costs; affidavit respecting disbursements.**— A charge, for the attendance of a witness, cannot be allowed without an affidavit, stating the number of days of his actual attendance; and, if travel fees are charged, the distance for which they are allowed. A charge, for a copy of a document or paper, cannot be allowed, without an affidavit stating that it was actually and necessarily used, or was necessarily obtained for use. An item of disbursements, in a bill of costs, cannot be allowed in any case, unless it is verified by affidavit, and appears to have been necessarily incurred and to be reasonable in amount, except fees paid to the clerk.

Notes to section 344.

This section is taken from section 3267 of the Code of Civil Procedure.

Clerk of this court must tax the costs on appeal. See § 341.

Disbursements are allowed by section 330.

Upon the recovery of nominal damages for the breach of a contract of sale, the seller is entitled to recover as of right "the disbursements now allowed by law and also the prospective charges for docketing judgment in the county clerk's office, the fee of the county clerk for issuing an execution and filing certificate of satisfaction, and the sheriff's fee for receiving and returning one execution thereon" as provided in the Consolidation Act, § 1420, as amended by Laws 1894, chap. 750, made applicable to this court by section 1369 of the Charter. *National Cash Register Co.* v. *Schmidt*, 48 App. Div. 472, 62 N. Y. Supp. 952.

Tabulated statement of costs and fees.— See end of § 356.

§ 345. **Costs upon appeal; to whom.**— Upon an appeal provided for in this act, the award of costs is regulated as follows:

1. If the appeal is dismissed because neither party brings it to a hearing, as prescribed by law, costs shall not be awarded to either party.

2. If the judgment or final order is reversed, costs must be awarded to the appellant.

3. If the judgment or final order is affirmed, costs must be awarded to the respondent.

4. If the judgment or final order is modified or a new trial is ordered, costs, or such part thereof, as to the appellate court seems just, besides disbursements, may be awarded to either party, absolutely, or to abide the event.

Notes to section 345.

This section is taken from sections 3060, 3066, and 3213 of the Code of Civil Procedure, which are applicable to justices' courts. See also § 310.

Appeal from judgment on default; no respondent.— Where an inquest was taken for default in appearance by defendant, and the justice dismissed the complaint, the remedy is by appeal; but whether the judgment is reversed and a new trial ordered, or the judgment affirmed, no costs will be allowed, there being no respondent. *Katz* v. *Diamond*, 16 Misc. Rep. 577.

Clerk of this court must tax the costs on appeal. See § 341.

A matter of right.— The court must award costs to the respondent in affirming a judgment, and the court has no power to relieve the party against whom a decision is made on appeal from costs. *Logue* v. *Gillick*, 1 E. D. Smith, 398. On reversing a judgment, the court has no discretion as to the costs. *Hahn* v. *Van Doren*, 1 E. D. Smith, 411; *Maine* v. *Eagle*, 1 E. D. Smith, 621; *Chapin* v. *Churchill*, 12 How. Pr. 367.

Where a judgment on appeal was reversed, and by inadvertence no costs were allowed to the appellant, the court, upon application, modified the order of reversal, and gave the appellant costs. If the judgment is reversed, the appellant is entitled to costs as a matter of right, and the court has no power to deprive him of them. *Wood* v. *Brown*, 6 Daly, 428.

Modified judgment or order, or new trial ordered.— See § 310, and also *Reibert* v. *Backenstross*, 71 Hun, 519; *De Bevoise* v. *Ingalls*, 88 Hun, 186. See *Southard* v. *Becker*, 15 Misc. Rep. 436.

Must be given on affirmance; when discretionary.— Under sections 3060, 3066, subdivision 3, and 3067, costs must be awarded to the respondent upon affirming on appeal a judgment; the provision of section 3213 gives discretion as to costs only where a judgment is modified or a new trial ordered. *Eisler* v. *The Union Transfer Co.*, 16 Daly, 456. See § 310.

New trial.— Where the judgment has been reversed and new trial granted, with costs to abide the event, such costs are now to be taxed by the clerk of this court as provided by section 341. This provision nullifies the decisions in *Van Bussam* v. *The Metropolitan etc.*, 16 Misc. Rep. 40; *Schlesinger* v. *Mayer, etc.*, 20 Misc. Rep. 353; s. c., 45 N. Y. Supp. 934.

Order, reversal of; how enforced.— Where the Appellate Term reverses an order setting aside a judgment taken by default, because the defendant was not duly served, the direction of the Appellate Term awarding costs to the appellant is final, and may be enforced as in case costs are awarded by final judgment. *Szerlip* v. *Baier*, 21 Misc. Rep. 692, 47 N. Y. Supp. 1081. See also *Bradley S. Co.* v. *Meinhold*, 23 Misc. Rep. 458, 52 N. Y. Supp. 679.

Tabulated costs and fees.— See end of § 356.

§ 346. **Costs upon appeal; amount.**— Upon an appeal, provided for in this act, costs when awarded must be as follows, besides disbursements:

To the appellant upon reversal, thirty dollars.

To the respondent upon affirmance, twenty-five dollars.

Notes to section 346.

This section is the same as section 3067 of the Code of Civil Procedure.

By section 341, the clerk of the court must tax the costs on appeal.

Tabulated costs, etc.— See end § 356.

Judgment costs on reversal.— On appeal from a judgment the appellant on reversal is entitled to $30 costs, *besides cost of the court below. Clark* v. *Carroll*, 61 How. Pr. 47.

Order opening a judgment, reversal of.— Where a justice makes an order opening a judgment, under section 1367 of the Consolidation Act, as amended by chapter 748 of the Laws of 1896, providing that from such an order "an appeal shall lie as from a judgment," the provisions of section 3067 of the Code of Civil Procedure apply to the matter of costs, and a party who successfully appeals from the order is, by the terms of that section, entitled to $30 costs upon a reversal. *Colwell* v. *Devlin*, 20 Misc. Rep. 616.

Upon the reversal of an order opening a default without stating the reason therefor, in which case the cause is remitted to the justice for a

rehearing, the costs to the successful appellant are $10 and disbursements, as on appeal from an order of the Supreme Court, and not the $30, as on appeal from a judgment of the Municipal Court, provided for in Code Civ. Proc., § 3067. *Strassner* v. *Thompson*, 40 App. Div. 28, 57 N. Y. Supp. 546. See also *Sandowitz* v. *Duane*, 30 Misc. Rep. 630, 62 N. Y. Supp. 744.

Printing brief.— Disbursements for printing a brief on an appeal from this court not taxable. *Mayer* v. *Friedman*, 30 Misc. Rep. 364.

§ 347. **Fees payable to clerks.**— There shall be paid to the clerks of the court, the following sums as court fees in an action, and there shall be no others.

1. Upon the issuing of a summons, one dollar.

2. For placing cause upon the calendar of court, one dollar, to be paid upon the return of the summons.

3. For a return upon an appeal from a judgment or order, two dollars.

4. For issuing an order of arrest, or a warrant of attachment, one dollar.

5. For entry of judgment upon confession, one dollar.

6. For trial by jury of six, four dollars and fifty cents; for trial by jury of twelve, nine dollars.

7. For certifying a copy of a paper on file in the clerk's office, ten cents for each folio of one hundred words, except return upon appeal.

All of the above fees shall be prepaid before the service shall be performed.

Notes to section 347.

This section supersedes sections 1416 and 1417 of the Consolidation Act (Laws 1882, chap. 410), which were taken from Laws 1857, chap. 344, §§ 67 and 68, except as to section 1416, the amendment of Laws 1887, chap. 307, and the repeal of subdivision 3, Laws 1886, chap. 678, and as to section 1417, the amendment of Laws 1868, chap. 308. Section 1417 is also taken from Laws 1857, chap. 295, §§ 7 and 8, Laws 1874, chap. 741, § 4.

The last sentence is taken from section 3281 of the Code of Civil Procedure. Section 1429 of the Consolidation Act was a similar provision.

The fees are now the same whether the amount demanded in the summons is less or over $50, and this distinction, contained in sections 1416 and 1417 of the Consolidation Act, has been abolished.

The "trial fee" is now a fee of $1 in all cases for placing the action on the calendar, which nullifies the decisions in *Matter of Hale*, 32 Misc. Rep. 104, 65 N. Y. Supp. 419; *Matter of Du Bois*, 36 Misc. Rep. 488, and there is now no longer any *return trial fee* in any case.

Clerks are to have no fees for their own use. See § 347.

Fire commissioner.— No fees or costs in actions to recover a penalty. Charter, § 773, until changed by the board of aldermen.

Poor person to pay jury fees. Section 40.

Tabular statement of fees.— See end of § 356.

§ 348. **Employee's action; no fees.**— When the action is brought by an employee against an employer for services performed by such employee, male or female, the clerks of this court shall not demand or receive any fees whatsoever from the plaintiff or his agents or attorneys in such action, if the plaintiff shall present proof by his own affidavit that his demand is less than fifty dollars, that he is a resident of the city of New York, that he has a good and meritorious cause of action against the defendant, and the nature thereof; that he has made either a written or a personal demand upon the defendant or his agent or representative, for payment thereof, and that payment was refused. Except that if the plaintiff shall demand a trial by jury, he must pay to the clerk the fees therefor prescribed in this act.

Notes to section 348.

This section is taken from section 1416 of the Consolidation Act (Laws 1882, chap. 410), as amended by Laws 1887, chap. 309.

The jury fee is $4.50. See § 44.

See also tabulated fees at the end of § 356.

Nurse.— Where services are rendered by a woman as a nurse in a family, she is entitled to the benefit of section 3221 of the Code of Civil Procedure, section 1405 of the Consolidation Act, but she cannot have $10 costs under sections 3222 (this section) and 3131 (relating to a justice court in the city of Brooklyn) of the Code of Civil Procedure. *Dillon* v. *Porter*, 12 Week. Dig. 207.

§ 349. **Fees, property of city.**— Except marshals' and jurors' fees, all moneys paid to the clerks of this court for fees shall be the property of the city of New York.

Note to section 349.

This section is new.

§ 350. **Fees on docket of judgment, in county clerk's office.**— When a judgment is docketed by a county clerk upon a transcript from a clerk of this court, he shall add to the amount of the judgment set forth in said transcript, a charge for docketing judgment in said office, the fee of the county clerk for issuing an execution and the sheriff's fees for receiving and returning one execution thereof.

Notes to section 350.

This section is taken from section 1420 of the Consolidation Act (Laws 1882, chap. 410), which was originally Laws 1857, chap. 344, § 70. See Laws 1853, chap. 617, §§ 3, 4.

See Costs. Duty of clerk on taxation. § 343.

Tabulated costs and fees.— See end of § 356.

§ 351. **Juror's fees.**— Every person summoned as a juror shall be entitled to a fee of twenty-five cents, to be paid as provided in this act.

Note to section 351.

See also sections 231 and 235, "Trial by jury," etc.

§ 352. **Witnesses' fees.**— A witness in an action or summary proceeding, pending in this court, or before a commissioner appointed by this court, or before a justice of this court, taking a deposition to be used in a court not of record of another state or territory of the United States is entitled, except where another fee is specially prescribed by law, to twenty-five cents for each day's attendance; and if he resides more than three miles from the place of attendance, to eight cents for each mile going to the place of attendance.

Notes to section 352.

This section is taken from sections 3327 and 3318 of the Code of Civil Procedure, relating to justices' courts.

See also section 197, "How subpœna served," and section 199, "How executed: fees thereupon."

Expert.— An expert witness is not bound to testify without compensation (*People* v. *Montgomery*, 13 Abb. N. S. 207), but he cannot get any expenses other than legal fees. *Fuller* v. *Mattice*, 14 Johns. 357.

And he cannot recover his fees from the justice; his remedy is against the party calling him. *Andrews* v. *Bates*, 5 Johns. 351; *Watts* v. *Van Ness*, 1 Hill, 76.

Disbursements for the services of expert witnesses, above the witness fees fixed by statute, cannot be taxed in the District Courts. *Randall* v. *Morning Journal Assn.*, 22 Misc. Rep. 715, 49 N. Y. Supp. 1064.

Parties, attorneys, etc.; when not allowed fees.— A party to an action or a special proceeding is not entitled to a fee, for attending as a witness therein, in his own behalf, or in behalf of a party who pleads jointly, or is united in interest with him; and an attorney or counsel, in an action or a special proceeding, is not entitled to a fee for attending as a witness therein, in behalf of his client. Code Civ. Proc., § 3288.

Settlement of the suit or a postponement discharges the witness's liability to attend court, and does not impair his right to retain the money paid to him. *Ford* v. *Monroe*, 6 How. Pr. 206.

§ 353. **Stenographer's fees.**— In all cases of appeal from an order or judgment made or rendered in this court, where a transcript of the stenographer's minutes of the testimony given on the trial of* hearing, becomes a necessary part of the return on appeal, the stenographer's fees for making up such transcript shall be ten cents for every one hundred words, and shall be paid in the first instance by the appellant, and afterwards taxable by him as a disbursement on the appeal.

Notes to section 353.

This section is taken from section 1367, subdivision 2 of the Charter (Laws 1897, chap. 378), which was formerly section 1439 of the Consolidation Act, and the same as Laws 1874, chap. 504, § 1.

The change is on the increase to double the fees, from five to ten cents for every one hundred words, the same as is paid in courts of record.

Contempt.— A stenographer will be punished for contempt for wrongfully refusing to deliver a copy of his minutes unless paid in excess of the statutory rate. *Cavanagh* v. *O'Neill*, 20 Misc. Rep. 233.

Justice; no copy minutes for.— There is no provision of law justifying a direction to the plaintiff to furnish the justice with a copy of the stenographer's minutes and include the expense in the costs as part of a judgment rendered in plaintiff's favor. *Cohen* v. *Weill*, 32 Misc. Rep. 198, 65 N. Y. Supp. 695.

Minutes of.— Must be furnished clerk within ten days after the fees therefor have been paid. See § 317.

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* So in original.

§ 354. **Marshal's fees.**— Fees shall be allowed to marshals for services rendered under the provisions of this act, as follows: For serving a summons, order of arrest, or attachment on one defendant, one dollar, and for every additional defendant actually served, fifty cents; for a copy of every summons delivered on request, or served, fifteen cents; for a copy of every attachment and of the inventory of the property attached, fifty cents; for serving and levying an execution or selling under an attachment, five cents for every dollar collected to the amount of one hundred dollars, and two and a half cents for every dollar collected over one hundred dollars; for every mile, going only, more than one mile, when serving a summons, order of arrest, attachment or execution, six cents, to be computed from the place of abode of the defendant, or where he shall be found, to the place where the same is returnable; for summoning a jury, one dollar and fifty cents; for going with the plaintiff or defendant to secure security, when security is ordered by the court, one dollar; for taking the defendant into custody on an order of arrest, execution, or commitment, two dollars and forty cents, serving a subpœna, twenty-five cents; for every levy actually made by virtue of an execution, one dollar; for serving a writ of possession or restitution, putting any person entitled into the possession of premises, and removing the tenant, when such powers can be exercised by a marshal, one dollar; and the same fees for traveling to serve the same as are herein allowed for serving a summons; for advertising for sale any property by virtue of any execution or attachment issued out of a district court, or by any justice thereof, one dollar; for every day necessarily employed in attending such sale, one dollar. The said marshals shall perform all other services required of them by law, without any fees or compensation whatever therefor, and no other fees, charges, or compensation shall be allowed to, demanded, or charged by any of the said marshals.

Notes to section 354.

This section is section 1710 of the Consolidation Act (Laws 1882, chap. 410), unchanged. Obviously it should have been changed. The

marshal is allowed one dollar for going with plaintiff or defendant "to *secure security*, when *security*" is ordered by the court, and for advertising for sale any property by virtue of any execution or attachment issued out of "a District Court, *or by any justice thereof*," one dollar. The "District Courts" have been abolished since January 1, 1898 (see § 1351, Charter); there is only one court now, and "the court" and not the justice, grants or issues the warrant. See § 75.

There is no provision made for the service of a complaint with the summons by the marshal. Under section 1419 of the Consolidation Act marshals were allowed twenty-five cents for every copy of complaint served, in addition to the $1 for serving the summons. This provision has been omitted.

Prior to section 1710 of the Consolidation Act (Laws 1882, chap. 410), Laws 1862, chap. 484, § 15, as amended by Laws 1864, chap. 569, § 3, regulated the fees of marshals.

Defaulting witness.— Fees on warrant of attachment against. See §§ 198, 199.

Bargains.— Any bargain between a plaintiff in an execution and the officer holding it, for payment of a compensation beyond that allowed by law for the collection, is void. *Downs* v. *M'Glynn*, 2 Hilt. 14, 6 Abb. Pr. 241.

Jury notice to be served by marshal. See § 231.

Keeper's fees.— The fees of a keeper for services not being fixed or allowed by law, an agreement to pay such fees, if not illegally extorted, is valid in law. *Maguin* v. *Rosenthal*, 62 How. 504.

No other fees, charges, or compensation shall be allowed to, demanded, or charged by any of the said marshals. See end of § 354.

Tabulated statement of marshal's fees.— See end of § 356.

Talesmen notice to be served by marshal. See § 236.

§ 355. **Costs on order to prosecute marshal's bond.**— Whenever an order shall be made pursuant to law, directing that the bond of a marshal be prosecuted in this court, the justice granting the motion and making the said order may award the aggrieved party his reasonable costs on said motion, not exceeding the sum of ten dollars, which shall be included in the judgment obtained upon such bond.

Note to section 355.

This section is the same as section 1425 of the Consolidation Act (Laws 1882, chap. 410), which was taken from Laws 1862, chap. 484, § 7.

§ 356. **Fees in summary proceedings.**— In summary proceedings to recover the possession of lands, the fees of officers, except where a fee is specially given in chapter twenty-one of the code of civil procedure, must be at the rate allowed by law, in an action in this court, and are limited in like manner, unless the application is founded upon an allegation of forcible entry or forcible holding out; in which case the judge or justice may award to the successful party a fixed sum as costs, not exceeding fifty dollars, in addition to his disbursements. The final order awarding costs may be docketed, and an execution may be issued to collect the costs awarded thereby in like manner as if the final order was a judgment rendered in the court in which the judge or justice is presiding officer.

Notes to section 356.

This section is the same as section 1418 of the Consolidation Act (Laws 1882, chap. 410), with the exception that the words, "in this court" are substituted for "in said courts," and the word "justice" is added in the last line.

See also § 354, "Marshal's fees," and note to § 1, subd. 12.

NOTE.— There are no sections from 356 to 360.

TABULATED STATEMENT OF COSTS AND FEES.

Costs; adjournment.— In discretion of the justice, besides disbursements $10 00
(See § 336.)

Id.; amending, modifying, or setting aside judgment.— Costs in discretion of the court. (See § 256.)

Id.; amendment of pleading.— In the discretion of the court, not to exceed 10 00
(See § 335.)

Id.; appeal.— To the appellant upon reversal..... 30 00
(See § 346.)

Id.—To the respondent upon affirmance..... 25 00
(See § 346.)

Id.— Stipulation that judgment be reversed..... 5 00
(See § 325.)

Id.; bastardy and abandonment bonds.— In addition to the other costs therein, *court* shall make and *clerk* enter in the judgment an additional allowance of 10 per centum of the judgment. (See § 339.)

Id.; building department.— Not liable for costs unless specially ordered. (See § 151.)

Id.; default, opening.— Court may award not exceeding $10. (See § 256.)

Id.; defendant; nonappearance of plaintiff.— The same as prescribed in section 332, subdivision 3, based upon plaintiff's demand.

In action to recover a chattel the amount is governed by the value thereof as set forth in plaintiff's affidavit. (§ 332, subd. 6.)

Id.; id.; counterclaim.— For $50 and under $100	$5 00
For $100 and under $200	7 50
For $200 and under $300	10 00
For $300 and under $400	12 50
For $400 or over	15 00

(§ 332, subd. 8.)

Id.; id.— After trial of issue of fact the same as prescribed in section 332, subdivision 2, based upon the amount of plaintiff's demand. (§ 332, subd. 5.)

In action to recover a chattel the amount is governed by the value thereof as set forth in plaintiff's affidavit. (§ 332, subd. 5.)

Id.; id.; counterclaim.— After trial of issues of fact. For $50 and under $100	10 00
For $100 and under $200	15 00
For $200 and under $300	20 00
For $300 and under $400	25 00
For $400 or over,	30 00

(§ 332, subd. 7.)

Id.; id.; increased.— Upon final judgment in action for recovery of money only, a chattel or final order in a special proceeding, instituted by a *State writ*, the same costs as prescribed in section 332, and in addition thereto, *one-half* thereof. (See § 333.)

Id.; demurrer.—Where judgment rendered on trial, same costs as if judgment upon default in the action. (See § 334.)

As a condition to plead over, in the discretion of the justice, not to exceed 10 00

(See § 334.)

Id.; discontinuance upon answer of title.— Party in whose favor final judgment is obtained in new action is entitled to costs; *except* where final judgment is rendered in favor of defendant, upon trial of issue of fact, unless it is certified that title to real property came in question on the trial. (See § 337.)

Id.; either party.—Where amount demanded is *under* $50, or where, in addition thereto, defendant interposes a counterclaim *under* $50, the court may, *in its* discretion, award not exceeding $5 00
(§ 332, subd. 1.)

Id.; forcible entry or forcible holding out.— In addition to disbursements to successful party 50 00
(See § 356.)

Id.; health department.— Recovery for less than $50, etc..... 10 00
(See Charter, §§ 1262, 1267.)

Id.; neither party to recover.— (See § 331.)

Id.; plaintiff; nonappearance or failure of defendant to answer.

For $50 and under $100	5 00
For $100 and under $200	7 50
For $200 and under $300	10 00
For $300 and under $400	12 50
For $400 or over	15 00

(§ 332, subd. 3.)

In action to recover a chattel the amount is governed by the value of the chattel as determined in the judgment. (§ 332, subd. 3.)

Id.; id.— After trial of issue of fact. For $50 and under $100, 10 00

For $100 and under $200	15 00
For $200 and under $300	20 00
For $300 and under $400	25 00
For $400 or over	30 00

(§ 322, subd. 2.)

In action to recover a chattel the amount is governed by the value of the chattel as determined in the judgment. (§ 332, subd. 2.)

Id.; id.; against counterclaim.—Where the action is for less than $50, and defendant interposes a counterclaim for $50 or over, and plaintiff recovers judgment upon the nonappearance of defendant, the same sum as plaintiff would be entitled to recover on default if the amount of his claim was the amount of defendant's counterclaim. (§ 332, subd. 4.)

Id.; settlement before trial the same as in section 332, subdivision 3, determined by the amount of settlement. (See § 332, subd. 9.)

Id.; id.—After trial, and before entry of judgment, same as section 332, subdivision 2, determined by the amount of settlement.

Id.; poor person.—Where costs awarded, must be paid to attorney, when collected from adverse party, and distributed among the attorneys and counsel, as the *court* directs. (See § 50.)

Id.; removal of action to City Court the same costs as if the action had been commenced in that court. (§ 332.)

Id.; stipulation on *appeal* that judgment be reversed..... $5 00
(§ 325.

Id.; title to real property, answer of.— See "Discontinuance," and § 337.)

Id.; id.—Where complaint dismissed pursuant to section 184 defendant entitled to same costs as in subdivision 2 of section 332. (See § 338.)

Id.; vacating, amending, modifying, or setting aside judgment, in *court's* discretion. (See § 256.)

Id.; working-woman.— *In addition* to the costs allowed in this court, where judgment is less than $10 ..... 5 00
Over $10 ..... 10 00

Upon a settlement, full costs on sum received on settlement. (See § 340.)

CLERK'S FEES.

Adjournment granted after return of jury, clerk must receive either ..... $4 50 or $9 00
(See §§ 238, 231, and 234.)

Appeal from judgment or order, return on (§ 347)..... 2 00

Arrest, issuing order of (§ 347)..... 1 00

Attachment, issuing warrant of (§ 347)..... 1 00

Calendar, placing action on (§ 347) 1 00

Certifying copy paper on file, except return on appeal, for each folio "of one hundred words" (§ 347, subd. 7)..... 10

Certificate to commissioner of jurors of fine imposed by judge on juror failing to attend. Failure to transmit, for each offense (§ 233) 150 00

City clerk, for filing transcript of judgment against a marshal in his office (§ 295) 50

City of New York, or any department, board, or officer thereof not to pay any fees. (§ 29.)

Id.—All moneys paid to the clerk, except marshals' and jurors' fees, shall be the property of. (§ 349.)

Clerk to account for and pay all fees into the city treasury (§ 283), and all fees paid to him, except marshals' and jurors' fees shall be the property of the city of New York. (§ 349.)

Confession, judgment on (§ 347) 1 00

Corporation counsel to pay no fees in actions by the city of New York. (§ 29.)

Docketing judgment upon transcript from clerk of this court. (See §§ 350, 3304 and 3307, Code Civ. Proc.)

Employee's action.— Male or female. Summons to be free. (§ 44.)

Clerk shall not demand or receive any fees whatsoever (§ 348), except a jury trial of six is demanded (§ 44), $4 50

And for a jury of twelve (§ 234) 9 00

Execution.— Issuing and sheriff's fees for receiving and returning. (§§ 350, 3304 and 3307, Code Civ. Proc.)

Fees paid to the clerk to be property of the city of New York, except marshals' and jurors' fees. (§ 349.)

Judgment on confession (§ 347) 1 00

Id.— Docketing, upon transcript from clerk of this court. (See §§ 3304 and 3307.)

Jurors and jury fees.— See tabulated statement of same, *post.*

Poor person may prosecute without paying any fees to any officer. Code of Civil Procedure, section 461, made applicable by section 3347, subdivision 3, of said Code. (See notes to § 45.)

Return on appeal from judgment or order (§ 347, subd. 3).... 2 00

Summary proceedings.—(See § 356.)

Summons, issuing (§ 347) 1 00

Id.— Employee's action, male or female, summons to be free. (§ 348.)

Id.— City of New York, or any department, board, or officer thereof not to pay any fees. (§ 29.)

Id.— Serving, by corporation counsel, entitled to fees. (§ 302.)

Id.— No fee to any person *other than a marshal,* for serving. (§ 302.)

Warrant of attachment, issuing (§ 347) 1 00

JUROR'S AND JURY FEES.

Juror failing to attend, fined (§ 233) $25 00

Clerk failing to transmit to commissioner of jurors certificate of fine imposed, for each offense (§ 233) 150 00

Id.— For summoning (§§ 351 and 235) 25

Jury trial, of six (§§ 44, 231, 347) 4 50

Id., of twelve (§§ 234, 347) 9 00

Id.; poor person.—(See notes to § 45.)

Id.; adjournment granted after return of jury, clerk must receive either ..... $4 50 or 9 00
(§§ 238, 231, 234.)

Id.; employee, summons free; if he demands jury trial must pay ..... $4 50 or $9 00
(§§ 44 and 348.)

Id.— Fee can only be taxed or included in the judgment *once.* (§ 238.)

Stenographer.— For making up transcript of minutes of testimony, for every 100 words (§ 353) 10

WITNESS' FEES.

Attendance each day (§§ 197 and 352) 25

Defaulting witness or party procuring warrant to pay fees of marshal. (§§ 199, 198.)

Mileage from his residence, more than three miles to place of attendance for each going to such place (§ 352 and 197), 08

Neglect or refusal to obey subpoena, all damages which party sustains and fine or imprisonment under section 8 (see § 200) 50 00

MARSHAL'S FEES, ETC.

Section 354.— Serving summons, order of arrest, or attachment on one defendant $1 00

For every additional defendant *actually* served 50

Copy of every summons delivered *on request,* or served ... 15

Copy of every attachment and of inventory of property attached 50

Serving and levying an execution, or selling under an attachment, for every dollar collected to the amount of $100 05

Over $100 ..... 02½

For every mile, *going only,* more than one mile, when serving a summons, order of arrest, attachment, or execution, to be computed from place of abode of defendant, or where found, to the place where same is returnable..... 06

Summoning jury (see also § 231) 1 50

Going with plaintiff or defendant to "secure security, when security" ordered by the court 1 00

Taking defendant into custody on order of arrest, execution, or commitment 2 40

Serving subpœna 25

Levy actually made on execution 1 00

Serving writ of possession, or restitution, putting person in possession of premises and removing tenant, when such powers can be exercised by marshal..... 1 00

Section 354 — Continued.

Same fees for traveling to serve the same as allowed for serving summons.

Advertising for sale any property by virtue of an execution or attachment issued out of this court, or by a justice thereof $1 00

Every day necessarily employed attending such sale 1 00

To perform all other services required by law, without fee or compensation, and no other fees, charges, or compensation are allowed to, demanded by, or chargeable.

Section 104.— Fees and expenses for keeping property replevied to be taxed by the court.

Section 302.— No fee to any person other than a marshal for serving process.

Section 355.— On order to prosecute bond, may award aggrieved party costs, to be included in the judgment obtained upon such bond, not exceeding 10 00

Section 199.— Serving warrant of attachment on defaulting witness, fees to be paid by person against whom issued, unless reasonable excuse shown to satisfaction of *court*, in which case, party procuring warrant must pay them, and if he recovers costs, the amount must be allowed to him as part thereof.

Section 303.— May serve process and mandates of this court, in *any part* of the city of New York.

NOTE.— There are no sections from 356 to 360.

TITLE XI.

Definitions; effect of act; laws repealed.

SECTION 360. Definitions.
361. Saving clause.
362. Construction.
363. Sections of the Code not applicable.
364. Laws repealed.
365. Act may be cited.
366. When to take effect.
Schedule of laws repealed.
Table showing disposition of laws repealed.

Note to title XI.

At the end of schedule of laws repealed and preceding "Table Showing Disposition of Laws Repealed," the following note appears: "(This table to be eliminated from act as an explanation.)" See notes to "Notes to Table Showing Disposition of Laws Repealed," *post*.

§ 360. **Definitions.**—Words used in this act in the past or present tense include the future as well as the past or present; words used in the masculine gender include the feminine and neuter; the singular number includes the plural and the plural the singular; the word "person" includes a corporation as well as a natural person; writing includes printing, printed or typewritten matter; "oath" includes affirmation or declaration; "signature" or "subscription" includes "mark," when the person cannot write, his name being written near it. The following terms also named in this act have the signification attached to them in this section, unless otherwise apparent from the context:

1. The word "attorney" signifies an attorney of the supreme court of this state, duly licensed to practice as such.

2. The word "district" signifies a district of the municipal court.

3. The word "clerk" signifies the clerk or assistant clerk.

4. The word "marshal" signifies any person authorized to perform the duties of a marshal.

5. The word "corporation" includes every association having any corporate rights, whether created by special acts of the legislature or under general laws.

Note to section 360.

This section is taken from section 1437 of the Consolidation Act (Laws 1882, chap. 410), which was the same as section 80, chapter 344, Laws 1857.

§ 361. **Saving clause.**—The repeal of a law or any part of it specified in the annexed schedule, shall not affect or impair any act done or right accruing, accrued or acquired, or liability, forfeiture or penalty incurred prior to September first, nineteen hundred and two, under or by virtue of any law so repealed, but the same may be asserted, enforced, prosecuted or inflicted, as fully and to the same extent as if such law had not been repealed; nor shall this act create a vacancy in any office or employment. All actions and proceedings commenced under or by virtue of the laws so repealed and pending on September first, nineteen hundred

and two, may be prosecuted in the same manner and with the same effect as they might under laws then existing, unless it shall be otherwise specially provided. Nothing in this act contained, shall be construed as affecting any existing provision of law so far as provisions apply to any portion of the state, other than the city of New York.

Note to section 361.

The commissioners on revision say of this section: "The foregoing is an adaptation from section 2143 of the Consolidation Act, and section 630 of the Provisional Justices' Code of 1899, as a saving clause."

§ 362. **Construction.**— The provisions of this act, so far as they are substantially the same as those of laws existing prior to September first, nineteen hundred and two, shall be construed as a continuation of such laws, modified or amended, according to the language employed in this act, and not as a new enactment; a reference in laws not repealed, to provisions of law incorporated into this act and repealed, shall be construed as applying to the provisions so incorporated. Where, in the charter, as amended in nineteen hundred and one, the term "hereinafter prescribed" or words equivalent thereto are used in sections relating to the municipal court, which are unrepealed, the reference shall be deemed to extend to this act.

Notes to section 362.

The commissioners on revision say of this section: "The foregoing is taken from section 631 of the Provisional Justices' Code of 1899, as a rule of construction, and with necessary additions."

When earlier law repealed.— When a section of a prior act has been omitted, and provisions upon the same subject, somewhat dissimilar, are contained in the Consolidation Act, the earlier act is repealed. *Matter of N. Y. Inst. for Deaf and Dumb*, 121 N. Y. 234; s. c., 25 Abb. N. C. 31, with note.

§ 363. **Sections of the code not applicable.**— The provisions of sections thirty-two hundred and seven to thirty-two hundred and fourteen, inclusive, of the code of civil procedure, do not apply to actions or proceedings in this court, except as specially provided in this act.

Note to section 363.

The sections above mentioned relate to the District Courts of the city of New York, and to the justices' courts of the cities of Albany and Troy. While this court is a continuation, consolidation, and reorganization of the District Courts (*Worthington* v. *London, G. & A. Co.*, 164 N. Y. 81, and notes to Charter, § 1351), sections 3207 to 3214 of the Code of Civil Procedure have become obsolete, and superseded by other laws, and they have been left in force only as to the justices' courts in Albany and Troy.

§ 364. **Laws repealed.**— The laws or parts thereof, specified in the schedule hereto annexed and all acts amendatory thereof or supplemental thereto, in force when this act takes effect, are hereby repealed.

Note to section 364.

The commissioners on revision say of this section: "The foregoing section is taken from the Provisional Justices' Code of 1899 as to laws repealed."

§ 365. **Act may be cited.**— This act may be cited as the municipal court act of the city of New York.

§ 366. **When to take effect.**— This act shall take effect on the first day of September, nineteen hundred and two.

SCHEDULE OF LAWS REPEALED.

Of, "**The Greater New York charter, as enacted in 1897 and amended in 1901,**" the following sections:

Laws of	Chapter.	Section.	Subject-matter.
1901....	466....	1364....	Jurisdiction of municipal court.
1901....	466....	1365....	Jurisdiction limited.
1901....	466....	1366....	Removal of causes.
1901....	466....	1367....	Appeals.
1901....	466....	1368....	Process.
1901....	466....	1369....	Procedure.
1901....	466....	1370....	Actions in what district brought.

Laws of	Chapter.	Section.	Subject-matter.
1901....	466....	1371....	Where court held.
1901....	466....	1372....	Seals, etc.
1901....	466....	1374....	Board of justices.
1901....	466....	1375....	Board to make rules.
1901....	466....	1376....	Concurrence of majority of board.
1901....	466....	1377....	Rules of supreme court applicable.
1901....	466....	1379....	Justice to administer oaths, etc.
1901....	466....	1380....	Access to court house.
1901....	466....	1384....	Summons and costs in action by city.
1901....	466....	1428....	Powers, duties and fees of marshals.
1901....	466....	1429....	Removal of marshals.

Notes to schedule of laws repealed.

Sections 1373, 1378, and 1383 omitted from said schedule are preserved as charter amendments. See notes to title VIII, art. I, under the contents, head of section 282.

Sections 1381, 1382 were repealed by the Charter amendments of 1901.

Sections 1384 to 1424 are not a part of the Municipal Court Act.

Sections 1424, 1425, 1426, and 1427 are preserved as Charter enactments. See note under title VIII, art. II, under contents, preceding Charter section 1424.

Of "**The New York city consolidation act, of eighteen hundred and eighty-two,**" as amended to nineteen hundred and two, the following sections:

Section.	Subject-matter.
1284....	Jurisdiction.
1285....	Jurisdiction in general.
1286....	No jurisdiction in certain cases.
1287....	Removal of actions to common pleas.
1288....	Former jurisdiction except as modified by code contained.
1289....	Actions in what district brought.
1290....	Actions by mayor, etc.

Section.	Subject-matter.
1291....	Court where and when held.
1292....	Court, by whom held, etc.
1293....	Seals.
1294....	Parties, appearance of.
1295....	Guardian ad litem for infant.
1296....	Action; how to be commenced.
1297....	Summons; requisites.
1298....	Return.
1299....	Non-resident plaintiff.
1300....	Summons; mode of service.
1301....	Who may serve summons.
1302....	Warrants of attachment to be served by marshal.
1303....	Process not to be served out of city.
1304....	Arrest; in what cases to be granted.
1305....	Affidavit and undertaking, on.
1306....	Arrests to enforce game laws.
1307....	Order of arrest; what to direct.
1308....	Papers delivered to arrested person; proceeding.
1309....	Proceedings when justice a witness.
1310....	Plaintiff to be notified of arrest.
1311....	Bail or deposit before return.
1312....	Bail may be examined.
1313....	Bail or deposit after return.
1314....	When and how defendant to remain in custody.
1315....	Duty of marshal in arrest proceedings.
1316....	Attachment; when may be granted.
1317....	What to be shown to procure attachment.
1318....	Contents of warrant.
1319....	Undertaking.
1320....	How warrant to be executed.
1321....	Service of summons and warrant.
1322....	Undertaking, by defendant, in.
1323....	Third person claim; bond, etc.
1324....	Judgment upon bond.
1325....	Action on undertaking when warrant vacated.
1326....	Return by marshal attaching.
1327....	Application to vacate or modify.
1328....	Effect of vacating warrant.

Section.	Subject-matter.
1329....	Judgment where property attached.
1330....	Foreclosure of lien on chattel.
1331....	Replevin; when action can be brought.
1332....	Affidavit and undertaking.
1333....	Requisition by justice.
1334....	How requisition executed.
1335....	Return to requisition.
1336....	Defendant when to except to sureties; proceedings thereon.
1337....	Defendant may reclaim chattel.
1338....	Justification of sureties.
1339....	When and to whom marshal to deliver chattel.
1340....	Penalty for wrong delivery by marshal.
1341....	Claim of title by third person.
1342....	Defendant may demand judgment for return, etc.
1343....	Actions on undertaking.
1344....	Proceedings where summons not personally served.
1345....	When action not affected by failure to replevy.
1346....	Pleading; takes place on return of summons; verified complaint.
1347....	Certain section of the code applicable.
1348....	Pleadings in action on bastardy bonds.
1349....	Answer of title.
1350....	Idem; defendant to deliver undertaking.
1351....	Idem; new action to be brought in supreme court.
1352....	Old action thereupon discontinued.
1353....	Penalty for failure to deliver undertaking.
1354....	Title appearing for plaintiff's showing.
1355....	Title; same cause of action and defense in new action.
1356....	Answer of title one or more of several defenses; proceedings.
1357....	Summary proceedings.
1358....	Summary proceedings; return of precept.
1359....	Summary proceedings; answer may be filed.

Section.	Subject-matter.
1360....	Summary proceedings may be transferred, etc.
1361....	Exhibition of accounts, etc.
1362....	Adjournments time, etc.; effect upon arrest.
1363....	Undertaking by arrested defendant on adjournment.
1364....	Adjournment either party; undertaking.
1365....	Conditions may be imposed for adjournment.
1366....	Dismissal of action for plaintiff's failure to appear.
1367....	Defaults; judgments may be opened, vacated, modified, etc.
1368....	Commissions to take testimony; code provisions applicable.
1369....	Testimony de bene esse.
1370....	Subpœnas.
1371....	Trial jurors, list of, etc.
1372....	Trial by jury; drawing, etc.
1373....	Jury may be summoned; fee.
1374....	How summoned.
1375....	Talesmen.
1376....	Ballots of jurors summoned, but not drawn.
1377....	Party demanding, to deposit trial fee.
1378....	Adjournments after return of jury.
1379....	Jurors' qualifications tried summarily.
1380....	Verdict; requisites.
1381....	Swearing the jury.
1382....	Non-suit; when authorized.
1383....	Judgment for plaintiff on default.
1384....	Issues* fact and law; judgment when rendered.
1385....	Judgment, when sum due exceeds jurisdictional amount.
1386....	Judgment when defendant liable to arrest.
1387....	Actions may be continued before another justice.
1388....	Powers of justice while trying action.
1389....	Justice limited to civil jurisdiction.
1390....	Death or removal not to impair proceedings.
1391....	Justice may administer oaths, etc.

* So in original.

Section.	Subject-matter.
1392....	Transcripts of judgments and docketing.
1393....	Execution against the person.
1394....	Replevin; judgment in, etc.; transcript.
1395....	Action against joint debtors.
1396....	Defendants not summoned to be designated.
1397....	Docketing judgment in another county.
1398....	Judgment against marshal.
1399....	Execution; requisites.
1400....	Against joint debtors.
1401....	Execution; arrest.
1402....	Renewal of execution.
1403....	Sections of code applicable; execution.
1404....	Enforcement of game laws.
1405....	Execution in favor of working woman.
1406....	Arrest and sale of property limited.
1407....	Marshal when liable to execution; creditor.
1408....	Return of execution; satisfaction of judgment.
1409....	Clerk's docket; what to contain.
1410....	Entries in; how made.
1411....	Clerk to keep index.
1412....	Clerk must deliver books, papers, etc., to successor.
1413....	Successor may issue execution, etc.
1414....	Certified copies, papers, etc., prima facie evidence.
1415....	Sections of code applicable, etc.; contempt.
1416....	Fees; when plaintiff's demand less than fifty dollars.
1417....	Fees; demand over fifty dollars.
1418....	Fees in summary proceedings.
1419....	Fees of marshals.
1420....	Costs.
1421....	Costs after discontinuance in answer of title.
1422....	Costs in action on bastardy bonds, etc.
1423....	Costs in action to enforce game laws.
1424....	Costs in action by working woman.
1425....	Costs on order to prosecute marshal's bond.
1426....	Supreme court rules made applicable.

Section.	Subject-matter.
1428....	Duties of clerks.
1429....	Clerks to account for and pay over fees.
1436....	Stationery, furniture, etc., furnished by corporation.
1437....	Definitions.
1438....	Appeals.
1439....	Stenographer's fees for minutes, etc.
1440....	Transcript of process, etc.; effect.
1700....	Bond to be executed by marshals.
1701....	Prosecution of such bond.
1702....	In what court prosecuted.
1703....	Judgments against marshals; transcripts; executions.
1704....	Entry of judgment against, to be noted on bond.
1705....	Amount collected credited on bond.
1706....	Suspension by common pleas for misconduct.
1707....	Clerk of court to report cancelled bonds, etc.
1708....	Appointment waived for failure to file bond.
1709....	Process to be served by marshal.
1710....	Fees of.
1711....	Certain laws to sheriffs made applicable.

Notes to Consolidation Act sections repealed.

Section 1427 is omitted from repeal schedule, but was superseded by Charter section 1373, which is preserved as a Charter enactment. See notes to title VIII, art. I, following contents and preceding section 282.

Sections 1430 to 1436, Consolidation Act, omitted from the repeal schedule, have been superseded by sections 1373, 1378, and 1380 of the Greater New York Charter. See notes to § 1373, Charter.

Sections 1441 to 1699, Consolidation Act, omitted from the repeal schedule, have no application to this court.

OF "THE CODE OF CIVIL PROCEDURE," THE FOLLOWING:

Section.	Subject matter.
3116....	Justice sixth district Brooklyn to be attorney.
3117....	Justices' jurisdiction in Brooklyn extended.
3118....	Justices' salaries, fees, etc.
3119....	Clerk; how appointed; salary, bond, etc.

Section.	Subject matter.
3120....	Duties of clerk.
3126....	When plaintiff may serve complaint with summons.
3127....	Jury trial; when and how demanded.
3128....	Setting aside default, etc.
3129....	Costs upon recovery of one hundred dollars.
3130....	Costs when defendant recovers judgment.
3131....	Costs in action by working woman.
3132....	Costs upon adjournment.
3215....	Jurisdiction civil action New York city (old) exclusively.
3216....	Removal of certain actions to city court.
3217....	When order of arrest may be granted.
3219....	Requisites of certain undertakings.
3220....	Docketing judgments; execution, etc.
3221....	Enforcement of certain judgments of working woman.
3222....	Costs in action by working woman.

Notes to Code of Civil Procedure sections.

Sections 3121 to 3126, 3133 to 3215, and section 3218, Code of Civil Procedure, omitted from the repeal schedule, have no application to this court.

"The Section Code of Civil Procedure, Revision Section," as it is called, will be found at the bottom of the second column next to the last page. Upon tne top of the following and last page, second column, it is erroneously headed "Consolidation Act section."

(This table to be eliminated from act, is included as an explanation.)

TABLE SHOWING DISPOSITION OF LAWS REPEALED.

Charter section.	Section of revision.	Consolidation Act section.	Revision section.
		1284....	1.
1364....	1.	1285....	1.
1365....	2.	1286....	2.
1366....	3.	1287....	3.

Charter section.	Section of revision.
1367....	310.
1368....	9.
1369....	4 to 8, inclusive, and under subjects stated in section.
1370....	25.
1371....	16.
1372....	17.
1374....	11.
1375....	12.
1376....	13.
1377....	19.
1379....	10.
1380....	18.
1381, 1382.	Repealed by charter amendatory act 1901.
1384....	29.
1428....	293 to 304 inclusive.
1429....	306.

Consolidation Act section.	Revision section.
1288....	4 to 8, inclusive, and revision generally.
1289....	25.
1290....	29.
1291....	16.
1292....	12.
1293....	17.
1294....	40 and 293.
1295....	41.
1296....	26.
1297....	27.
1298....	37.
1299....	Not necessary.
1300....	31.
1301....	36.
1302....	55.
1303....	30.
1304....	56.
1305....	57.
1306....	Not necessary.
1307....	58.
1308....	59.
1309....	60.

Consolidation Act section.	Revision section.
1310....	61.
1311....	62.
1312....	63.
1313....	64.
1314....	65.
1315....	66 and 67.
1366....	106.
1337....	107.
1338....	108, 109, 111.
1339....	111.
1340....	112.
1341....	113, 114, 115.

Consolidation Act section.	Revision section.
1316....	73.
1317....	74.
1318....	75
1319....	76.
1320....	77.
1321....	83.
1322....	84.
1323....	85.
1324....	86.
1325....	87.
1326....	88.
1327....	89.
1328....	90.
1329....	91.
1330....	137 to 140, inclusive.
1331....	95.
1332....	96, 97, 98.
1333....	101.
1334....	102, 103, 104.
1335....	105.
1362....	193.
1363....	66, 67, 193.
1364....	194.
1365....	195.
1366....	Not necessary, covered by 248.
1342....	117.
1343....	118, 119, 120, 123, 125, 126, 127, 128.
1344....	129.
1345....	130.
1346....	145.
1347....	146 to 176, inclusive.
1348....	178.
1349....	179.
1350....	180.
1351....	181.
1352....	182.
1353....	183.
1354....	184.
1355....	185.
1356....	186.
1357....	1, subdivision 9, and under subjects stated.
1358....	1, subdivision 9, and under subjects stated.
1359....	1, subdivision 9, and under subjects stated.
1360....	1, subdivision 9, and under subjects stated.
1361....	165.
1390....	15.
1391....	10.
1392....	260 and 261.
1393....	251.
1394....	261.

Consolidation Act section.	Revision section.
1367....	253, 254, 255, 256.
1368....	205 to 226, inclusive.
1369....	
1370....	196.
1371....	233.
1372....	231–232.
1373....	234.
1374....	235.
1375....	236.
1376....	237.
1377....	Included in last 7 sections and 238.
1378....	238.
1379....	240.
1380....	239.
1381....	240.
1382....	248.
1383....	147 to 230.
1384....	230.
1385....	250.
1386....	251.
1387....	14.
1388....	4 to 8.
1389....	Not necessary.
1395....	264 to 268, inclusive.
1396....	264 to 268, inclusive.
1397....	269.
1398....	270.
1399....	271.
1400....	266.
1401....	272.
1402....	273.
1403....	262, 263, 273.
1404....	Not necessary, except in section 1, subdivision 7.
1405....	274.
1406....	275.
1407....	276.
1408....	277.
1409....	284 to 289, inclusive.
1410....	284 to 289, inclusive.
1411....	284 to 289, inclusive.
1412....	284 to 289, inclusive.
1413....	284 to 289, inclusive.
1414....	284 to 289, inclusive.
1415....	4 to 8, inclusive.
1416....	44. Title X.
1417....	Title X.

Consolidation Act section.	Revision section.
1418....	Title X.
1419....	Title X.
1420....	Title X.
1421....	Title X.
1422....	Title X.
1423....	Title X.
1424....	Title X.
1425....	Title X.
1426....	19.
1428....	282.
1429....	283.
1436....	18.
1437....	353.
1438....	310 to 328.
1439....	Title X.
1440....	Not necessary, 289.
1700....	294, 295, 296.
1701....	294, 295, 296.
1702....	294, 295, 296.
1703....	297.
1704....	298.
1705....	299.
1706....	306.
1707....	300.
1708....	301.
1709....	302.
1710....	Title X.
1711....	304.

Section Code of C. P...	Revision section.
3116 to 3133, inclusive..	(Brooklyn old provisions.) Under subjects stated in sections.
3215 to 3222, inclusive..	Old N. Y. city provisions under subjects stated in sections.

Notes to table showing disposition of laws repealed.

The statement at the head of this table that it is "to be eliminated from this act, and is included as an explanation" is contained in the original act filed in the office of the Secretary of State, and it has not been eliminated from the act, but is a part of the act for the purpose of explanation.

Charter § 1367, revision § 310, § 353 should be added.
§ 1371, revision § 16, should be § 17.
§ 1372, revision § 17, should be § 18.
§ 1373, omitted from the table, is preserved as a Charter enactment.
§ 1375, revision § 12, should be § 13.
§ 1376, revision § 13, should be § 14.
§ 1377, revision § 19, should be § 20.
§ 1378, omitted from the table, is preserved as a Charter enactment.
§ 1380, revision § 18, should be § 19.
§ 1383, omitted from the table, is preserved as a Charter enactment.
§ 1384, revision § 29, should be § 27.
§§ 1385 to 1424, omitted from the table, have no application to this court.

Consolidation Act.— The sections run along numerically from section 1284 to section 1335. These are followed by section 1362 to section 1366, with a repetition of section 1366 on the top of the next, the second column, which latter should be section 1336. The table then continues in regular order until section 1361 is reached. Section 1362, which should follow, is to be found five lines from the bottom of the first column, and continues to section 1366; the continuation from this section — section 1367 — is to be found on the top of the next page, first column, and follows the numerical order until section 1389 is reached, when section 1418, instead of section 1390, appears. Section 1390 is to be found in the second column, fifth line from the bottom of the preceding page, and runs along numerically to section 1394; the continuation from this section — section 1295 — is to be found on the top of the next page, second column; the table then continues in numerical order to section 1417, when section 1707 appears. Section 1418 is to be found in the first column, six lines from the bottom of the same page and runs to section 1423; the continuation, section 1424, is to be found on the top of the next or last page of the act, first column, and continues numerically to section 1440, excepting sections 1427, 1430 to 1436, this is followed by section 1700 to section 1706. Section 1707 is to be found on the preceding page, second column, fifth line from the bottom of the

page, continuing numerically to section 1711, the end of the sections of the Consolidation Act which have any application to this court.

Charter § 1387, revision § 14, should be § 15.

§§ 1424 to 1428, omitted from the table, were preserved as Charter enactments.

§§ 1440 to 1700 have no application to this court.

CHARTER SECTIONS PRESERVED.

SECTION 1. The city of New York corporations consolidated; short title of this act.

2. Division into boroughs.

1350. Courts, etc., abolished.

1351. Municipal court created.

1352. Justices.

1353. Qualifications, etc., of justices.

1354. Oath.

1355. Salary.

1356. Terms.

1357. Vacancies.

1358. Districts.

1359. Borough of The Bronx.

1360. Borough of Manhattan.

1361. Borough of Brooklyn.

1362. Borough of Queens.

1363. Borough of Richmond.

1373. Clerks and assistant clerks.

1378. Clerks to administer oaths.

1383. Removal.

1424. The marshals.

1425. Appointment of.

1426. Assignment of, by the mayor.

1427. Mayor to appoint.

"Forms repay the close attention of counsel, as well as of attorney and clerk. They are not merely weapons of contest, for whatever is said, the form remains to show what was done." — AUSTIN ABBOTT.

APPENDIX OF FORMS.

(Revised by Hon. GEORGE F. ROESCH, *one of the Justices of this Court and Chairman of the Committee on Revision and on Forms and Rules.*)

No. 1.

Summons.

(Municipal Court Act, § 28.)

MUNICIPAL COURT OF THE CITY OF NEW YORK, BOROUGH OF DISTRICT.

Plaintiff,	
against	Summons.
Defendant.	

To the above-named defendant:

You are hereby summoned and required to appear in this action, in the Municipal Court of the city of New York, borough of , District, in the courtroom thereof, at , in the city of New York,* on the day of , 190 , at o'clock in the forenoon, to answer the complaint of the plaintiff in this action, who, if you then fail to appear and answer, will take judgment against you for the sum of dollars, with interest from the day of , 190 , together with the costs of this action.

Dated , 190 . *Clerk.*

NOTES.

A copy, or an "alias" summons is the same as above, except that it has the word "copy," or "alias" before the word "summons," opposite the title.

See also case of *Ellinghausen* v. *Leask*, 1 Abb. N. C. 299.

Where an order of arrest accompanies the summons, substitute at the* the following: "Immediately after your arrest in this action." Municipal Court Act, § 58.

The summons in an action prosecuted by a "pauper," or poor person, is the same as an ordinary summons, and is stamped "Free," or "Free Alias."

This summons must be returned to the clerk the day before the return day, and the calendar fee paid, to entitle it to be placed on the calendar. Rule 4, Rules of Practice of this Court.

No. 2.

Marshal's Certificate of Service.

MUNICIPAL COURT OF THE CITY OF , BOROUGH OF JUDICIAL DISTRICT.

City of , *ss.:*

On the day of , 190 , I served a copy of the within summons and complaint in the borough of , in the city of New York, on the within-named defendant , in person, at No. street.

Dated , 190 . *Marshal.*

No. 3.

Affidavit of Service.

(See Rule 18, Supreme Court Rules, and also Rules of Practice of this Court.)

City of , *ss.:*

, being duly sworn, says that he is years of age; that on the day of , at No. , in said borough, in the city of New York, he served a copy of the within summons and complaint on , the defendant therein named, by delivering to and leaving with him personally a true copy thereof; that he knew the person so served to be the person described in said summons as defendant therein.

Sworn to before me, this day of , 190 .

[Signature.]

No. 4.

Marshal's Return of Nonservice.

[*Title of cause.*]

[*Venue.*] *ss.:*

I hereby certify that the within summons and complaint was not served, for the reason that, after diligent search, I could not find the the defendant [*or*, if a corporation, "any officer of the defendant"] upon whom I could serve the same [*or other reason, as the case requires*].

Dated , 190 . *Marshal.*

No. 5.

Petition, etc., for Leave to Prosecute as a Poor Person.

(See Rules of Practice of this Court; Code Civ. Proc., §§ 458–468; Municipal Court Act, §§ 45–53.)

To the Municipal Court of the city of New York, Borough of , Judicial District:

The undersigned respectfully represents that he resides at , and has a good cause of action, arising on against , who resides at , and that is not worth the sum of one hundred dollars, exclusive of the wearing apparel and furniture necessary for self and family, and the above subject-matter which is not in possession of. Wherefore your petitioner respectfully asks the court for leave to prosecute as a poor person, and prays that an attorney and counsel be assigned to , to conduct the action.

Dated , 190 . [*Signature.*]

[*Venue.*] *ss.:*

, of said city, being duly sworn, says, that the statements contained in the above petition are true.

Sworn to before me, this day of , 190 .

[*Signature.*]

I hereby certify that I have examined the claim mentioned in the foregoing petition, and upon such examination am of the opinion that the petitioner has a good cause of action.

Dated , 190 . [*Signature of attorney.*]

MUNICIPAL COURT OF THE CITY OF NEW YORK, BOROUGH OF

Upon the foregoing petition, affidavit, and certificate, Ordered, that the petitioner be admitted to prosecute the above-described claim as a poor person.

, Esquire, is hereby assigned as attorney and counsel in the action.

Dated , 190 . *Justice.*

No. 6.

Affidavit by Employee against Employer for Services, Male or Female.

(Municipal Court Act, §§ 44, 348.)

MUNICIPAL COURT OF THE CITY OF NEW YORK, BOROUGH OF

[*Venue.*] *ss.:*

, being duly sworn, says that he resides at No. street, in the city of New York in the borough of , District, and has lately been in the employ of , who transacts business or resides at in said city and borough. That the sum of $ $\frac{}{100}$ is now due from such employer to this deponent for services performed by this deponent while in such employment. That he has made demand upon the defendant for payment, and that payment was refused. That deponent has a good and meritorious cause of action against said employer to recover said sum of money. [*State whether any previous application was made, and, if so, its disposition.*]

Sworn to before me, this day of , 190 .

[*Signature.*]

Appointment of Guardian for Infants.

(Municipal Court Act, § 41.)

An infant cannot sue in his own name. *Hulburt* v. *Newell*, 4 How. Pr. 93. Nor can his general guardian sue for him without a special appointment. *Hoyt* v. *Hilton*, 2 Edw. Chy. Rep. 202; *Buerman* v. *Buerman*, 3 How. N. S. 393; *S. C.*, 17 Abb. N. C. 391. He must first apply to the judge of the court in which he would sue for the appointment of a suitable person as guardian to appear for him for the purpose of the suit. This must be done before the commencement of the action (*Wilder* v. *Emler*, 12 Wend. 191); otherwise it will be irregular. *Hill* v. *Thacther*, 3 How. Pr. 407. This application must be made by the infant, if he is of the age of fourteen; if not, then by his general guardian, or some relative or friend. *Hahn* v. *Van Doren*, 1 E. D. Smith, 411; *Anable* v. *Anable*, 24 How. Pr. 92.

No. 7.

Petition, Affidavit, and Order for Appointment of Guardian for an Infant under the Age of Fourteen Years.

To the Municipal Court of the city of New York, Borough of , District:

The petition of , of the borough of , respectfully shows:

I. That , of said borough, is an infant under the age of fourteen years, and is now thirteen years of age.

II. That your petitioner is the stepfather of said , and has the care and charge of said infant, and educates, supports, and maintains him as such stepfather [*or set forth appropriate facts*].

III. That the said infant, , has good cause of action against to recover the sum of dollars, for wages due him by said , for work, labor, and services from about the day of , to about the day of , 190 ; and that it is desirable that an action be commenced in this court to recover said sum of dollars. [*As to previous application, see Form No.* 6.]

Wherefore your petitioner prays that he may be appointed the guardian of said infant, , for the purposes of said action.

Dated , 190 . [*Signature.*]

[*Venue.*] *ss.:*

, being duly sworn, deposes and says that he has read the foregoing petition, which is true to his own knowledge, except as to the matters which are therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

Sworn to before me, this day of , 190 . }

[*Signature.*]

No. 8.

Consent of Guardian.

I hereby consent to become the guardian *ad litem* of , and to be responsible for costs if he fail in the action, for the purposes mentioned in the foregoing petition.

Dated , 190 . [*Signature.*]

No. 9.

Order Thereon.

On reading and filing the petition of , and the affidavit thereto annexed, each dated , 190 , it is ordered that of the borough of , be appointed the guardian *ad litem* of said , for the purpose of an action to be commenced in this court against one .

Dated , 190 . [*Signature of justice.*]

Appointment of Guardian for Infant Defendant.

(Municipal Court Act, §§ 41, 42, 49.)

Where an infant is a defendant, it is essential that a guardian *ad litem* should be appointed for him, after service of the process, and before proceeding to join issue. (15 Abb. Pr. 12.) Judgment rendered against an infant for want of an answer and without the appointment of a guardian *ad litem*, is irregular, and will be set aside on motion. *Kellogg* v. *Klock*, 2 Code Rep. 28; *Mockey* v. *Grey*, 2 Johns. 192.

No. 10.

Petition by Infant Defendant over Fourteen Years of Age for the Appointment of a Guardian Ad Litem.

To the Municipal Court of the city of New York, Borough of , Judicial District:

The petition of , the defendant in this action, respectfully shows:

I. That an action has been commenced against your petitioner in this court by [*here state the object of the action*].

II. That your petitioner is an infant of the age of years, and resides with his father at No. , street, in the borough of , and that is his general guardian.

III. That six days have not elapsed since the service of the summons on your petitioner [*or*] that no application for appointment of guardian *ad litem* to appear in behalf of your petitioner in said action has been made, to the best of your petitioner's knowledge and belief.

Wherefore your petitioner asks that may be appointed his guardian *ad litem*, to appear and defend said action on his behalf.

[*Signature.*]

[*Verification, consent of proposed guardian, and proof of competency, as in preceding forms.*]

No. 11.

Order of Appointing Guardian Ad Litem for Infant Defendant.

[*Title of action.*]

On reading and filing the annexed petition of , verified the day of 190 , for the appointment of as his guardian *ad litem*, and the consent of said , Ordered, that said be and is hereby appointed guardian *ad litem* for the petitioner , and authorized and directed to appear and defend on his behalf the action mentioned therein.

[*Signature of justice.*]

No. 12.

Petition by Relative or Friend of Infant Defendant under Fourteen Years of Age.

To the Municipal Court of the city of New York, Borough of , Judicial District:

The petition of respectfully shows:

I. That the above-entitled action has been commenced by service of a summons upon , and that the object of said action is [*here state it concisely*].

II. That said is an infant under the age of fourteen years, and resides with the petitioner, who is his father, and that he has no general guardian [*or otherwise state what guardianship he has*].

Wherefore your petitioner asks that a guardian *ad litem* be appointed to appear and defend said action on behalf of said infant.

[*Signature.*]

[*No previous application, etc., as in Form No. 6.*]

[*Verification, consent, and order, as in preceding forms.*]

No. 13.

Application and Affidavit to Obtain an Order of Arrest.

(Municipal Court Act, § 57.)

To the Municipal Court of the city of New York, Borough of , District:

The subscriber hereby applies on behalf of for an order of arrest against the person of on the grounds set forth in the affidavit hereunto annexed.

Dated the day , 190 . [*Signature.*]

[*Venue.*] ss.:

, being duly sworn, doth depose and say that he resides at No. street, in the borough of , in the city of .

That , who resides at , is justly indebted unto , who resides at , in the sum of dollars, over and above all payments and set-offs. [*State facts.*]

That said has a cause of action against said for:

That the provision of law under which the foregoing application for an order of arrest is made, and which authorizes the issue of an order of arrest as follows:

That the facts and circumstances which show the within are as follows: [*State as to no previous application as in Form No. 6.*]

Sworn to before me, this day of , 190 .

[*Signature.*]

No. 14.

Undertaking to Obtain Order of Arrest.

(Municipal Court Act, § 57.)

[*Title of action.*]

Whereas an application has been made or is to be made by to the Municipal Court of the city of New York, Borough of , District, for an order of arrest in favor of , the above-named plaintiff, against the person of , the above-named defendant.

Now therefore and in consideration of the granting of said application and the issuing of said order of arrest, and of one dollar to us in hand paid, we

do hereby, in pursuance of the statutes of the State of New York in such case made and provided, jointly and severally undertake and agree that if the defendant in the above-entitled action recover judgment against the said plaintiff, that the said plaintiff will pay to said defendant all costs and extra costs that may be awarded to said defendant , and all damages which he may sustain by reason of the arrest in said action not exceeding the sum of dollars [*double the amount claimed*].

In witness whereof, ha hereunto set hand the day of , 190 .

Signed and delivered in the presence of [*Signature.*]

[*Venue.*] *ss.:*

, being duly sworn, doth depose and say that he is one of the sureties to the foregoing undertaking, that he resides at No. street, in the borough of , in the city of New York, and is a holder within this , and is worth the sum of dollars [*twice the amount specified in the undertaking*] over all his debts and liabilities which he owes or has incurred, and exclusive of property exempt by law from levy and sale under an execution.

Sworn to before me, this day of , 190 . }

[*Signature.*]

[*Venue.*] *ss.:*

, being duly sworn, doth depose and say that he is one of the sureties to the foregoing undertaking, that he resides at No. street, in the borough of , in the city of New York, and is a holder within this , and is worth the sum of dollars [*twice the amount specified in the undertaking*] over all his debts and liabilities which he owes or has incurred, and exclusive of property exempt by law from levy and sale under an execution.

Sworn to before me, this day of , 190 . }

[*Signature.*]

[*Venue.*] *ss.:*

I certify that on this day of 190 , before me personally came the within named , to me known, and known to me to be the individuals described in, and who executed the within undertaking, and severally acknowledged to me that they executed the same.

Notary Public, *Co.*

I approve of the within undertaking as to form and the sufficiency of the sureties therein named.

Dated , 190 . [*Signature.*]

No. 15.

Order of Arrest.

(Municipal Court Act, § 58.)

[*Title of action.*]

The People of the State of New York, to any Marshal of the city of New York, greeting:

Whereas, it has been made to appear by affidavit of that the above-named plaintiff has a good and sufficient cause of action

against the above-named defendant, and that pursuant to the statutes of the State of New York in such case made and provided, an order for the arrest of the said defendant may issue by reason of and that the undertaking required by law has been duly executed and approved.

Now therefore you are hereby commanded to arrest the said defendant, , if he can be found in the city of New York, and forthwith bring him before the Municipal Court of the city of New York, borough of , District, at the courtroom of said court, No. , in said borough.

You are further commanded to make return of this order to said court with your proceedings thereunder as prescribed by law.

I direct that the summons accompanying this order be made returnable immediately upon the arrest of the defendant.

The defendant may be let to bail in the sum of dollars.

Dated the day of , 190 .

Justice of said court.

Clerk.

[*Venue.*] *ss.:*

I hereby certify that on the day of , 190 , at o'clock, in the noon, at No. street, in the borough of , in the city of New York, I served upon the within-named defendant, in person, the within order of arrest, the undertaking and all the papers upon which said order of arrest was granted, and at the same time and place I served on said defendant , in person, the summons issued in the action and the complaint therein by delivering to and leaving with him true copies of the same and showing him the originals thereof; and that I know the person so served to be the defendant in said action.

I further certify that at the time above mentioned, I arrested the said defendant, , and took him forthwith before the justice who issued the order and that upon making the arrest I immediately gave notice thereof to plaintiff , to wit: at o'clock in the noon, on the day of , 190 .

Dated , 190 .

Marshal.

EXTRACTS FROM THE LAW GOVERNING ORDERS OF ARREST.

The marshal, upon arresting the defendant by virtue of an order of arrest, must at the same time serve upon him the summons, and also a copy of the order of arrest and of the papers upon which it was granted. Municipal Court Act, § 59.

The marshal making the arrest must immediately give notice thereof to the plaintiff, and indorse on the order of arrest and subscribe a certificate stating the time of serving the same, and of his giving notice to the plaintiff. Municipal Court Act, § 61.

No. 16.

Undertaking upon Arrest by Defendant.

[*Title of court and action.*]

The above-named defendant, , having been arrested by , one of the marshals of the city of New York, upon an order of arrest granted by Hon. , justice of said court in a certain action therein, brought by the above-named plaintiff, against the above-named defendant, now therefore we, of and , do hereby jointly and severally undertake in the sum of dollars [*sum specified in the order of arrest*] that said defendant arrested as aforesaid, will attend in person at the opening of said court on the next day thereafter when it is there in session, then this obligation to be void, otherwise it remains in full force.

Dated, New York, , 190 .

[*Signatures.*]

NOTE.

Add justification (double amount), acknowledgment and approval; one or more sureties will suffice. The officer taking the acknowledgment, must, *if the marshal so requires*, examine under oath to a reasonable extent the persons offering to become bail concerning their property and their circumstances. Defendant may deposit with the marshal the sum specified in the order of arrest. Municipal Court Act, §§ 62, 63.

No. 17.

Undertaking of Defendant on Adjournment when under Arrest.

(Code Civ. Proc., §§ 3218, 3180, and Municipal Court Act, § 67.)

[*Title of action.*]

Whereas, the above-named defendant has been arrested in this action, and issue has been joined therein, and he has applied for an adjournment to the day of , 190 , which has been granted. Now therefore we , of No. street, and of No. street, in the borough of , in the city of New York, do jointly and severally undertake and agree that the said defendant shall appear on the said adjourned day, and not depart until duly discharged according to law, or until after the trial and judgment in such action, and that he will surrender himself into custody, if any execution be issued upon said judgment when obtained against him in this action: and if he shall not so appear and remain until after the trial and judgment, and surrender himself on said execution, the amount recovered in said judgment, together with all costs and extra costs that may be awarded therein.

Dated day of , 190 .

[*Signatures.*]

[*Venue.*] *ss.:*

and of said borough, being duly sworn, say, and each for himself says, that he resides in the borough of , in the city of New York, and that he is a holder therein, and is worth the sum of dollars, over and above all debts and liabilities, and property by law exempt from execution.

Sworn to before me, this day of , 190 . }

[*Signature.*]

[*Venue.*] *ss.:*

On this day of , 190 , before me personally appeared and to me known to be the persons described in, and who executed the foregoing undertaking, and who severally acknowledged that they executed the same.

Notary Public, Co.

Approved as to form and sufficiency.

Justice.

NOTE.

This undertaking need not be given, if defendant has given bail or made a deposit under Municipal Court Act, § 62.

No. 18.

Application, Affidavit, and Undertaking for Warrant of Attachment.

(Municipal Court Act, §§ 73–92.)

To the Municipal Court of the city of New York, Borough of , District:

The subscriber applies for a warrant of attachment against the property of on the ground set forth in the affidavit hereunto annexed.

Dated the day of , 190 .

[*Signature.*]

[*Venue.*] *ss.:*

, being sworn, says that he resides at No. street, in the borough of , in the city of New York; that is justly indebted unto who resides at No. street, in said borough, in the sum of over and above all counterclaims known to him, which the said ha against which debt arose as follows: [*Here specify.*]

[*No previous application as in Form No.* 6.]

Sworn to before me, this day of , 190 . } [*Signature.*]

UNDERTAKING.

Whereas, plaintiff, having applied to the Municipal Court of the city of New York, borough of , Judicial District, for a warrant of attachment against the property of , defendant, and such court having ordered the warrant to issue on filing the undertaking required by statute: Now, in consideration thereof, and one dollar to us in hand paid, we and of the borough of , in the city of New York, do jointly and severally undertake and agree, that if the said defendant recover judgment against the said plaintiff, or in case the warrant of attachment be vacated, the plaintiff will pay to the said defendant all costs that may be awarded to him and all damages he may sustain by reason of the attachment, not exceeding the sum of dollars [*twice the amount of the plaintiff's demand*]. And that if the plaintiff recovers judgment he will pay to the defendant all money received by him from property taken by virtue of the warrant of attachment, or upon any bond given therefor over and above the amount of the judgment and interest thereupon.

In witness whereof, we have hereunto set our hands the day of , 190 .

[*Signature.*]

[*Venue.*] *ss.:*

, being duly sworn, doth depose and say, that he is one of the above-named sureties; that he resides at No. street, in the borough of , in the city of New York, and is a holder therein and worth dollars, as well over and above all claims, undertakings, liabilities and indebtedness, as over and above the property of deponent which by law is exempt from sale by execution.

Sworn to before me, this day of , 190 .

[*Signature.*]

[*Venue.*] *ss.:*

, being duly sworn, doth depose and say, that he is one of the above-named sureties; that he resides at No. street, in the borough of , in the city of New York, and is a holder therein and worth dollars, as well over and above all claims, undertakings, liabilities and indebtedness, as over and above the property of deponent which by law is exempt from sale by execution.

Sworn to before me, this day of , 190 .

[*Signature.*]

[*Venue.*] *ss.:*

On the day of , 190 , before me personally came , to me known, and known to me to be the individuals described in and who executed the foregoing undertaking, and who severally acknowledged that they executed the same.

Notary Public, Co.

I hereby approve of the within undertaking, as to form, and as to the sufficiency of the sureties, and let a warrant of attachment issue.

Dated , 190 .

Justice.

NOTE.

The undertaking must be in at least double the value of the property and not less than two hundred dollars. Code Civ. Proc., §§ 2908, 3219, and Municipal Court Act, § 76.

No. 19.

Warrant of Attachment.

(Municipal Court Act, § 75.)

[*Venue.*] *ss.:*

The People of the State of New York, to any Marshal of the city of New York, greeting:

Whereas, has made an application to the Municipal Court of the city of New York, borough of , Judicial District, for a warrant of attachment in favor against the property of on the ground of , according to the provisions of the Municipal Court Act of the city of New York, for a debt of dollars and cents, being the amount sworn to by the applicant; and the requisite proof by affidavit, and an undertaking with sufficient surety having been made and executed: You are therefore required to attach on or before the day of , 190 , and safely keep so much of the goods and chattels not by law exempt from execution, of the said as will satisfy the plaintiff's demand with the costs and expenses, in order to satisfy any judgment that may be recovered on this warrant of attachment. And do you make return of your proceedings hereon to the said court, at the courtroom, in said borough, on the day of , 190 , at o'clock in the forenoon, and have you then and there this warrant.

Given under my hand at the place last aforesaid, the day of , 190 .

Justice.

NOTE.

In executing this process the marshal will observe the requirements of §§ 73–92 of the Municipal Court Act.

No. 20.

Defendants' Undertaking for Redelivery of Attached Property.

(Municipal Court Act, § 84.)

[*Title of action.*]

Whereas, the property of the above-named defendant has been attached in this action by one of the marshals of the city of New York. Now therefore , the said defendant as principal, and as surety, do hereby jointly and severally undertake to the said plaintiff pursuant to the statute in such case made and provided in the sum of dollars [*twice the value of the property attached*] that if judgment is rendered against the defendant and an execution is issued thereupon within six months after the giving of this undertaking, the property attached shall be produced to satisfy the execution.

Dated , 190 .

In presence of

[*Signature.*]

[*Venue.*] *ss.:*

, being duly sworn, doth depose and say that he is one of the above-named sureties; that he resides at No. street, in the borough , in the city of New York, is a holder therein, and is worth dollars, over all the debts and liabilities which he owes or has incurred, and exclusive of property exempt by law from levy and sale under an execution.

Sworn to before me, this day of , 190 }

[*Signature.*]

[*Venue.*] *ss.:*

, being duly sworn, doth depose and say that he is one of the above-named sureties; that he resides at No. street, in the borough , in the city of New York, is a holder therein, and worth hundred dollars, over all the debts and liabilities which he owes or has incurred, and exclusive of property exempt by law from levy and sale under an execution.

Sworn to before me, this day of , 190 }

[*Signature.*]

[*Venue.*] *ss.:*

I certify that on this day of , 190 , before me personally appeared and , known to me, and to me

known to be the individuals described in, and who executed the within bond, and who severally acknowledged that they executed the same.

[*Signature of notary public.*]

I hereby approve of the within undertaking, as to form and sufficiency.

Dated , 190 . [*Justice, or marshal.*]

NOTE.

If more than one surety, the undertaking must be joint and several in form. Code Civ. Proc., § 812.

Inventory of Property Attached.

By virtue of the within warrant of attachment I did, at the borough of , in the city of New York, on the day of , 190 , attach and take into my custody the following goods and chattels of the within-named defendant, to wit:

That I made an inventory of the property so seized and attached, on the day of , 190 .

Marshal.

No. 21.

Bond for Delivery of Attached Property to Third Person.

(Municipal Court Act, § 85.)

Know all men by these presents, that we, and , are held and firmly bound unto in the sum of [*double the value of the property claimed*], to be paid to the said , for which payment well and truly to be made, we do jointly and severally bind ourselves, our heirs, executors, and administrators, firmly by these presents. Sealed with our seals.

Dated the day of , 190 .

Whereas, certain goods and chattels, to wit [*naming the attached property claimed*]: were on the day of , 190 , seized by one of the marshals of the city of New York, by virtue of a warrant of attachment issued by the Municipal Court of the city of New York, borough of , District, in favor of the above-named and against ; and whereas the above-bounden claims the said goods and chattels as his property; and the same have not been reclaimed by the defendant, by virtue of the provisions of the Municipal Court Act of the city of New York.

Now therefore the condition of this obligation is such that if, in an action upon this bond, commenced within three months hereafter, the said claimant will establish that he was the general owner of the property claimed, at the time of the seizure; or if he fails so to do, that he will pay to the said the value thereof, with interest, then this obligation to be void, otherwise to remain in full force and virtue.

[*Signatures.*] [L. S.]

[L. S.]

NOTE.

Add acknowledgment, justification, and approval. The claimant must execute the bond; one surety suffices. The marshal or justice may approve in at least twice the value of the property claimed. Municipal Court Act, § 85.

No. 22.

Marshal's Return of Proceedings on Warrant of Attachment Served Personally.

[*Venue.*] *ss.:*

By virtue of the within warrant of attachment, I did, on the day of , 190 , at , in the said borough, in the city of New York, attach and take into my custody the following-described goods and chattels of the defendant, and immediately made an inventory thereof, of which I certify the annexed to be a correct copy; and immediately thereafter I served the within summons, attachment, and inventory personally on * by delivering to him personally copies thereof.

[*Date.*] [*Marshal's signature.*]

Same, copies left at defendant's residence.

[*To the * as above, then add*] by leaving copies thereof, certified by me to be such, at the said defendant's last place of residence at , in the said borough, in the city of New York, with [*or, if his name is not known,* "with a man, aged apparently years," *etc., describing him*], a person of suitable age and discretion. And I further certify that said defendant could not, with reasonable diligence, be found within said county.

[*Date.*] [*Marshal's signature.*]

Same, by posting copies on door of residence.

[*To the * as above, then add*] by posting copies thereof, certified by me to be such, on the outer door of the said last place of residence at , in said borough, in the city of New York, and also depositing like certified copies thereof in the general post office inclosed in a sealed postpaid wrapper, directed to the said at , that being his residence. And I further certify that said defendant could not, with reasonable diligence, be found within the said borough, and that a person of suitable age and discretion could not be found at the defendant's said last place of residence therein.

[*Date.*] [*Marshal's signature.*]

Same, where defendant has no residence in the boroughs.

[*To the * as above, then add*] by delivering copies thereof, certified by me to be such, to , the person in whose possession the property attached was found. And I further certify that said could not, with reasonable diligence, be found within the said boroughs, in the city of New York, and has no place of residence therein.

[*Date.*] [*Marshal's signature.*]

NOTE.

If the marshal delivers the attached property to the defendant, upon receipt of an undertaking, or to a third person upon receipt of a bond, that fact should be stated in the return fully.

No. 23.

Order Vacating Warrant of Attachment.

[*Title of action.*]

The defendant having made application to this court, upon the return of the summons issued in the above-entitled action, to vacate [*or*, "modify," *or* "increase the plaintiff's security given upon"] the warrant of attachment herein, upon the papers upon which the said warrant was granted (and "upon the affidavits of ,") [*omit the clause in parentheses, if the defendant presents no proofs*];

Now, upon hearing the respective parties [*add, unless the motion was heard upon plaintiff's papers only*] "and upon reading and filing the affidavits of" [*here state the names of the persons making affidavits and used by the plaintiff and defendant on the motion*];

Ordered, that the said warrant of attachment be and the same is hereby vacated [*or* "modified," *stating how*]; *or*, ordered that the plaintiff's security be increased to the sum of dollars, and that upon failure of the plaintiff forthwith to so increase his security, the said warrant of attachment be vacated.

[*Date.*] [*Justice's signature.*]

NOTE.

The court may, on its own motion, if it deems the papers, upon which it was granted, insufficient to authorize it, vacate the warrant of attachment. In such case, the court, in place of the first two sentences, should state its reasons for so doing. Municipal Court Act, § 89.

No. 24.

Execution against Property Taken by Attachment.

(Code Civ. Proc., § 2918, and Municipal Court Act, § 91.)

The People of the State of New York, to any marshal of the city of New York, greeting:

Whereas, judgment was rendered on the day of , 190 , by the Municipal Court of the city of New York, Borough of , Judicial District, in an action in said court, between , plaintiff, and , defendant, in favor of said plaintiff, , against the said defendant, for the sum of dollars.

And whereas, the sum of dollars is now actually due thereon;

Therefore we command you, that you satisfy the said judgment by collecting the amount due thereon, together with your fees out of the personal property of the said defendant, attached by you by virtue of the warrant of attachment issued in said action, and pay the same to the party entitled thereto; and return this execution within twenty days after its receipt by you, to the said court, Borough of , Judicial District, with a certificate thereon indorsed, stating the manner in which you have executed the same.

Witness, Hon. , justice of said court, at the borough of , the day of , 190 .

Clerk.

No. 25.

Affidavit in an Action to Recover a Chattel.

(Code Civ. Proc., § 1695, and Municipal Court Act, §§ 95–131.)

[*Title of action.*]

State of New York, Borough of } *ss.:*

, plaintiff in this action, being duly sworn, says that , the owner of the following-described chattel, that is to say:

That the said chattel wrongfully detained from the plaintiff by , the defendant herein.

That the alleged cause of the detention thereof, according to the best knowledge, information, and belief of deponent, is as follows:

That the said chattel ha not been taken by virtue of a warrant against the plaintiff for the collection of a tax, assessment, or fine issued in pursuance of a statute of this State or of the United States.

That said chattel ha not been seized by virtue of an execution or warrant of attachment against the property of the plaintiff or of any person from or through whom the plaintiff has derived title to said chattel since the seizure thereof. [*No previous application as in Form No. 6.*]

That the actual value of said chattel is

Sworn to before me, this day of , 190 . }

[*Signature.*]

To any marshal of the city of New York, to whom the summons in this action is delivered, greeting:

You are hereby required to replevy the chattel described in the within affidavit, on or before the day of , 190 .

[*Justice.*]

[*Attorney for plaintiff.*]

NOTE.

Where the affidavit is made by the attorney, and all the material facts are not within his personal knowledge, substitute the following:

7. That all the above allegations [*or, if portions thereof are made upon information and belief, state what portions are so made*] are made upon information and belief; that the grounds of deponent's belief are [*here state such grounds*], and that the reason why this affidavit is not made by the plaintiff is that he is not within the borough of deponent's residence or "office," or "that he is not capable of making this affidavit because [*give reason*].

No. 26.

Complaint in Action to Recover a Chattel.

[*Title of action.*]

[*Venue.*] *ss.:*

The complaint of the above-named plaintiff respectfully shows to this court, that the defendant ha become possessed of, and wrongfully detains from the plaintiff, the following chattels of the plaintiff, that is to say: of the value of , as he believes, and that said chattels have been demanded by the plaintiff from the defendant before the commencement of this action.

Wherefore the plaintiff demand that the defendant may be adjudged to deliver to the plaintiff the said goods and chattels, and to pay the plaintiff damages for the detention thereof, to the sum of , and that the same may be forthwith delivered to the plaintiff,

[*Plaintiff's attorney.*]

[*Venue.*] *ss.:*

, plaintiff in this action, being duly sworn, says that the foregoing complaint is true to his own knowledge, except as to the matters which are therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

Sworn to before me, this day of , 190 . }

[*Signature.*]

NOTE.

As to form and requisites of complaint against marshal for refusing to receive bond and deliver goods, see *Kamena* v. *Wanner*, 6 Abb. 193, 6 Duer, 698.

No. 27.

Plaintiff's Undertaking in an Action to Recover a Chattel.

(Code Civ. Proc., § 1699; Municipal Court Act, §§ 96, 99.)

[*Title of action.*]

Whereas, , the above-named plaintiff , has made an affidavit that the above-named defendant wrongfully detain certain chattel in the said affidavit described of the value of , and the said plaintiff claim the immediate delivery of said chattel pursuant to the provisions of the statutes of the State of New York in such case made and provided;

Now therefore, and in consideration of the taking of said property, or any part thereof, by one of the marshals of the city of New York, by virtue of the said affidavit and the requisition thereupon indorsed, we, , of , of , of , do, pursuant to said statute, hereby jointly and severally undertake and become bound to the defendant in the sum of for the prosecution of the action of the said plaintiff against the said defendant in said court for wrongfully detaining said property, the return to the defendant of the said chattel , or so much thereof as shall be taken by virtue of the said affidavit and requisition thereupon indorsed, if possession thereof is adjudged to him, or if the action abates or is discontinued before the chattel returned to defendant ; and for the payment to said defendant of any sum which the judgment awards to him against the plaintiff .

In witness whereof, we have hereunto set our hands, the day of , 190 .

Signed and delivered in presence of [*Signatures.*]

[*Venue.*] *ss.:*

, being duly sworn, doth depose and say, that he is one of the sureties to the foregoing undertaking; that he is a resident and holder within this State, and is worth the sum of dollars [*twice the amount specified in the undertaking*] over all his debts and liabilities he owes or has incurred, and exclusive of property exempt by law from levy and sale under an execution.

Sworn to before me, this day of , 190 .

[*Signature.*]

[*Venue.*] *ss.:*

, being duly sworn, doth depose and say, that he is one of the sureties to the foregoing undertaking; that he is a resident and holder within this State, and is worth the sum of dollars [*twice the amount specified in the undertaking*] over all his debts and liabilities which he owes or has incurred, and exclusive of property exempt by law from levy and sale under an execution.

Sworn to before me, this day of , 190 .

[*Signature.*]

[*Venue.*] *ss.:*

I certify that on this day of , 190 , before me personally came the above-named , to me known, and known to me to be the individuals described in and who executed the above undertaking, and severally acknowledged to me that they executed the same.

[*Signature.*]

I approve the within undertaking as to form and the sufficiency of the sureties therein.

Dated , 190 . *Justice.*

NOTE.

The undertaking must be approved by the justice (Municipal Court Act, § 99), and the undertaking must be executed by at least two sureties, of which the plaintiff may be one, in a sum not less than twice the value of the property claimed. Code Civ. Proc., §§ 1699, 2920, 811, 812.

No. 28.

Marshal's Return in Proceedings to Replevy.

By virtue of the annexed affidavit and requisition thereon indorsed, I did, on the day of , 190 , replevy the following property, described in the said affidavit [*describing the property as described in the affidavit*], which I found in the possession of the defendant [*or*, "the defendant's agent"]. [*Here state the fact and the mode of service of the summons, affidavit, and requisition, as in attachment cases; also state what disposition has been made of the chattels, pursuant to the provisions of Municipal Court Act*, §§ 102, 103, 104, 105.]

[*Date.*] [*Marshal's signature.*]

No. 29.

Notice by Defendant Excepting to Plaintiff's Sureties.

[*Title of action.*]

Take notice that , the above-named defendant, except to the plaintiff's sureties in the undertaking given by him in this action.

[*Date.*] [*Defendant's signature.*]

To [*plaintiff or marshal*].

NOTE.

The sureties must justify before the justice, on the return of the summons. Municipal Court Act, §§ 106, 107.

No. 30.

Notice by Defendant to Reclaim Chattel.

[*Title of action.*]

Sir.— Take notice that require the return of the chattel replevied in the above-entitled action.

[*Date.*] [*Defendant's signature.*]

To , Esq., *Justice.*

NOTE.

If the defendant demands the return of a part of the chattels replevied, in a case prescribed in the last sentence of Code Civ. Proc., § 2925, the notice should describe the chattel demanded as described in the affidavit of the plaintiff.

No. 31.

Affidavit Thereon.

[*Title of action.*]

[*Venue.*] *ss.:*

, being duly sworn, deposes and says:

1. That the above-named defendant is the owner of the chattel described in the annexed notice.

or, 1. That the above-named defendant is lawfully entitled to the possession of the chattel described in the annexed notice, by virtue of a special property therein, to-wit: [*Here set forth the facts with respect to the special property.*]

[*Jurat.*] [*Defendant's signature.*]

No. 32.

Undertaking Thereon.

(Code Civ. Proc., § 1104; Municipal Court Act, § 107.)

[*Title of action.*]

Whereas, the defendant in the above-entitled action demands the return of the chattel [*or,* "demands the return of the following chattels," *describing them*] replevied by the above-named plaintiff, the value of which, as stated in said plaintiff's affidavit, is [*here state such value*]:

Now therefore, we, the undersigned, for the procuring of such return, and in consideration thereof, do jointly and severally undertake, and become bound in the sum of not less than [*twice the value above stated*], for the delivery of said chattel to the plaintiff, if delivery thereof is adjudged; or if the action abates in consequence of the defendant's death and for the payment to the plaintiff of any sum which the judgment awards against the defendant.

[*Date.*] [*Signatures.*]

[*Add acknowledgment, justification, and approval by justice. Two sureties are required; the defendant need not join. The sureties must justify before the justice.* Municipal Court Act, §§ 106, 109.

No. 33.

Examination of Plaintiff's or Defendant's Sureties.

[*Title of action.*]

On this day of , 190 , before the undersigned, a justice of the Municipal Court of the city of New York, borough of the Judicial District, personally appeared and , the sureties of the plaintiff [*or* "defendant"] in the annexed under-

taking. to justify pursuant to section 106 of the Municipal Court Act, and the said surety, being duly sworn [*here state testimony taken*], and the said , surety, being duly sworn, says [*etc., as above*].

[*Signatures of sureties.*]

Sworn to before me, the day first above written.
Justice.

No. 34.

Allowance Thereon.

This day appeared before me the within-named , and , sureties to the within undertaking, and justified as upon such an examination as required by law; and I find said sureties to be sufficient, and allow the same.

[*Date.*] *Justice.*

[*To be indorsed on the undertaking.*]

No. 35.

Affidavit by Third Person for Delivery of Chattel to Him.

[*Title of action.*]

[*Venue.*] *ss.:*

, being duly sworn, deposes and says that was entitled, as against the defendant, to the possession of the chattel [*describing it*] replevied in the above-entitled action, at the time the same was so replevied, and now makes such claim; and that the facts upon which such right depends are as follows: [*Here state such facts.*] [*No previous application, etc., as in Form No.* 6.]

[*Jurat.*] [*Signature.*]

No. 36.

Marshal's Notice to Plaintiff of Third Person's Claim.

[*Title of action.*]

Take notice that claims the property replevied by me in this action [*or* "claims the following property replevied by me in this action"]; that he has served upon me an affidavit, of which a copy is herewith served upon you; and that I require indemnity against such claim. [*Marshal's signature.*]

To [*plaintiff's attorney, who appears for him before the court.*]

No. 37.

Plaintiff's Undertaking to Indemnify Marshal against Such Claim.

(Code Civ. Proc., § 1711; Municipal Court Act, § 115.)

[*Title of action.*]

Whereas, the following property [*describing it*] has been replevied in this action, and is now held by , one of the marshals of the city of New York, and one claims to have the right to the possession thereof, and has delivered to the said marshal an affidavit, as required by law; and whereas the said marshal has served upon the said plaintiff a copy of the said affidavit, and a notice that he requires indemnity against the said claim;

Now therefore, we, the undersigned, do hereby jointly and severally undertake pursuant to the statute, to the said , marshal, that he will indemnify him against any liability for damages, costs, or expenses to be incurred in an action brought against him by the said claimant, or any person deriving title from or through the claimant, by reason of the taking or detention of the said chattel, or its delivery to the plaintiff, not exceeding the sum of dollars.

[*Date.*] [*Signatures.*]

NOTE.

Add acknowledgment, justification, and approval by marshal. In the justification the sureties must swear that they are freeholders or householders in the city of New York. The undertaking must be executed by two sureties; the plaintiff need not join. If the marshal does not approve the undertaking and requires the sureties to be examined, such examination must be before the court out of which the proceedings issued. As to amount, see Municipal Court Act, § 115; also Code Civ. Proc., § 1711.

No. 38.

Execution on a Judgment Awarding the Recovery of a Chattel.

(Municipal Court Act, § 124; Code Civ. Proc., § 1373.)

The People of the State of New York, to any marshal of the city of New York, greeting:

Whereas, judgment was rendered on the day of , 190 , by the Municipal Court of the city of New York, borough of , Judicial District, in an action in said court between , plaintiff , and , defendant , in favor of the said plaintiff , against the said defendant ,

Therefore we command you that you deliver the possession of the chattel above described to the said , he being the part to whom the judgment awards the possession thereof, if the same can be found within the city of New York; and in case a delivery of said chattel cannot be had, you are required to satisfy the amount adjudged by said judgment, as the value thereof, to-wit: the sum of dollars and interest thereon, and also, in either case, to satisfy the moneys awarded by said judgment as damages and costs, to-wit: the sum of dollars and interest thereon, together with your fees, out of the personal property of the said judgment debtor within the city of New York, not exempt from levy and sale by virtue of an execution, and to pay the same to the party entitled thereto, and return this execution within twenty days after its receipt by you, to the said Municipal Court of the city of New York, Borough of , Judicial District, with a certificate thereon indorsed, stating the manner in which you have executed the same.

Witness, Hon. , justice of said court, at the borough of , the day of , 190 .

Clerk.

No. 39.

Notice of Motion to Set Aside Plaintiff's Proceedings on Ground of Irregularity.

Sir.— Take notice that upon the [*move on all papers served and on pleading and proceedings*], a motion will be made before [*whatever court and where and when*], that the affidavit made by the plaintiff in this action and the requisition to any marshal of the city of New York, indorsed therein, and all proceedings taken by the plaintiff or by the said marshal by virtue thereof, respectively, may be set aside as void and irregular for that, etc. [*specify irregularities complained of*]; and that the property taken by the said marshal under the said affidavit and requisition, respectively, may be restored by him to the said defendant, and that the plaintiff may be ordered to pay the costs of this motion, and [for *usual prayer for relief*].

[*If any affidavit be necessary to show irregularities extraneous to the papers, serve copy with notice, and state as to previous applications as to Form No. 6.*]

[*If the proceeding be by an order to show cause, alter form accordingly, and insert the words "service less than eight days sufficient."*]

No. 40.

Answer of Title to Real Property.

(Municipal Court Act, § 179.)

[*Title of action.*]

The defendant, for an answer to the plaintiff's complaint in this action, denies each allegation of the complaint; and he alleges the following facts, showing that the title to real property will come in question, to-wit: that the land upon which the alleged trespass was committed, is the land of the defendant [*or otherwise, as the case may be*].

[*Signature of defendant, his agent, or attorney.*]

[*Countersigned by justice.*]

I hereby countersign the within answer, this day of , 190 . , *Justice.*

No. 41.

Undertaking Thereon.

(Municipal Court Act, § 116.)

[*Title of action.*]

Whereas, the defendant in the above-entitled action has [*or* "is about to"] set forth in his answer facts, showing that the title to real property will come in question in said action:

Now therefore, we, the undersigned, do jointly and severally undertake, pursuant to the statute, that if the plaintiff, within twenty days from the day of , 190 [*day of putting in answer*], deposit with the justice a summons and complaint in a new action, for the same cause, to be brought in the Supreme Court of New York, the defendant will, within twenty days after the deposit, give a written admission of the service thereof. [*If the defendant was arrested, add:* "and that the defendant will at all times render himself amenable to any mandate, which may be issued to enforce a final judgment, in the action so to be brought."]

[*Date.*] [*Signatures.*]

[*Add acknowledgment, justification, and approval by justice. One surety suffices; defendant need not join.*]

No. 42.

Notice of Motion.

(With or without stay of proceedings.)

[*Title of action.*]

Sir.—Take notice that upon the [*describe the papers on which the motion is made*], a motion will be made before [*whatever court, and where and when*], for an order [*here state nature of order or relief applied for*].

If for irregularities, state in full the irregularities complained of. See Supreme Court Rules.

[*If stay of proceedings is desired, then add*] And in the meantime, and until the hearing and decision of this motion [*or until the further order of this court*], let all proceedings of the plaintiff [*or the defendant*], his attorneys, agents, or servants, and any marshal of the city of New York, be stayed.

Dated, etc. [*Signature of attorney.*]

[*Justice's signature, if on order to show cause.*]

NOTE.

In drawing order made by the justice [*whether relief demanded is made or denied*], make it correspond precisely with the relief demanded, or *vice versa*. If the proceedings be by an order to show cause, alter accordingly, and state as to previous application as to Form No. 6.

No. 43.

Order to Show Cause.

[*Title of action.*]

On the affidavit of , verified on the day of , 190 , which is hereto annexed, and on all the papers and proceedings in the above-entitled action, it is hereby ordered, that the plaintiff show cause before the Municipal Court of the city of New York, borough of , Judicial District, at the courtroom thereof, No. , in said borough of the city of New York, on , the day of , 190 , at o'clock in the forenoon, or as soon thereafter as counsel can be heard, why the judgment heretofore rendered in said action by default, on the day of , 190 , and fully described and set forth in said affidavit, should not be opened, vacated, and set aside, and said defendant allowed to come in and defend said action, and why said defendant should not have such other and further relief as to the court may seem meet and just and until further order or determination herein, let all proceedings on the part of the plaintiff or any marshal of the

city of New York, upon said judgment, or toward the collection or enforcement thereof, be and the same are hereby stayed.

And, it appearing that there is a sufficient reason for requiring a shorter notice than eight days, service of this order may be made on or before the day of , 190 .

Dated , 190 . *Justice.*

No. 44.

Affidavit to Obtain Adjournment of Trial.

(See § 193, Municipal Court Act.)

[*Title of action.*]

[*Venue.*] *ss.:*

, being duly sworn, deposes and says, that he is the in this action; that issue was joined herein on the day of , 190 ; that deponent has fully and fairly stated the case herein to , his counsel, who resides , in the borough of , in the city of New York; and that deponent has a good and substantial defense to said action, on the merits, as he is advised by said counsel, after such statement, and verily believes to be true; that he has stated to his counsel what he expects and believes he will be able to prove on the trial hereof by , who is a material and necessary witness for deponent thereon, and that without the testimony of said , deponent cannot safely proceed to trial, as he, deponent, is advised by his said counsel, and verily believes. That this action is brought to recover [*here state the nature of the action and defense, and show the materiality of the evidence*].

That deponent has made diligent efforts to find said witness, and could not. That on the day of , 190 , deponent procured a subpœna for him, for the purpose of procuring the attendance of said witness at this court this day, and that said subpœna was not served, for the reason that after a vigilant search and inquiry for said witness at his residence and place of business it was ascertained that he had left the borough of , in said city, expecting to return on the day of , 190 , at which time, and not sooner, deponent believes he will be able to procure his attendance as such witness herein.

Sworn to, etc. [*Signature.*]

NOTE.

[This affidavit should be varied according to circumstances, and the nature and materiality of the evidence sometimes should appear, so that the justice may determine whether the witness is really material or not, and to enable the other side to say whether they will admit what is expected to be proved by the absent witness, and in that way render the adjournment unnecessary.]

No. 45.

Undertaking on Long Adjournment.

(Municipal Court Act, § 194.)

[*Title of action.*]

Whereas, issue has been joined in this action, and the above-named has applied for an adjournment under section 194 of the Municipal Court Act (Laws 1902, chap. 580). Now, we, , of street, and , of street, of the borough of , in the city of New York, do undertake and agree that we will pay to the in this action the damages, costs, and extra costs, in case judgment shall be rendered against the said in this action.

Dated the day of , 190 .

[*Signature.*]

[*Affidavits and acknowledgments as before.*]

COMMISSIONS.

[*Commissions issued in this court in forms similar to those issuing out of courts of record. Blanks for the same, with directions for their return, and instructions to the commissioners, may be procured at the stationers'. They are too lengthy for insertion here.*]

No. 46.

Subpœna to Testify.

(Municipal Court Act, § 196.)

The People of the State of New York, to , greeting:

We command you, that all business and excuses being laid aside, you and each of you appear and attend before the Municipal Court of the city of New York, borough of , Judicial District, at the courtroom of said court, in the borough of , in said city, on the day of , 190 , at o'clock in the forenoon, to testify and give evidence in a certain action now pending in said court, then and there to be tried between plaintiff , and defendant , and for a failure to attend you will be deemed guilty of a contempt of court, and liable to pay all loss and damages sustained thereby to the party aggrieved, and forfeit fifty dollars in addition thereto.

Witness, , Esq., a justice of our said Court, at the borough of , in the city of New York, the day of , in the year one thousand nine hundred and .

Clerk.

No. 47.

Subpœna Duces Tecum.

(See Municipal Court Act, § 196.)

The People of the State of New York, to , *greeting:*

We command you, that all business and excuses being laid aside, you appear and attend before the Municipal Court of the city of New York, borough of , Judicial District, at the courtroom of said court, at No. street, in the borough of , in said city, on the day of , 190 , at o'clock in the noon, to testify and give evidence in a certain action now pending undetermined in the said court, between defendant on the part of , and bring with you and produce at the time and place aforesaid a certain now in your custody, and all other deeds, evidences, and writings which you have in your custody or power concerning the premises. And for a failure to attend you will be deemed guilty of a contempt of court, and liable to pay all loss and damages sustained thereby to the party aggrieved, and forfeit fifty dollars in addition thereto.

Witness, , Esq., justice of our Court at the borough of , in the city of New York, the day of , 190 .

Clerk.

NOTE.

A *subpœna duces tecum* must be served at least five days before the trial, otherwise the party who needs a book or paper must procure an order from the justice, requiring the production thereof, by the person having it in custody. See Code Civ. Proc., § 867. The foregoing form of subpœna will answer for the order, omitting the direction, "The People," etc. See also Municipal Court Act, § 196.

No. 48.

Marshal's Return Thereon.

I hereby certify that I * served the within [*or* "annexed"] subpœna on , at , on the day of , 190 , by reading the same [*or stating its contents*] to him personally, and by paying [*or tendering*] to him the sum of , his lawful fee for one day's attendance as a witness.

[*Date.*] [*Marshal's signature.*]

No. 49.

Affidavit for Warrant of Attachment against Witness.

[*Title of action.*]

[*Venue.*] *ss.:*

If a private person served the subpœna, his affidavit of service is necessary; if a marshal served it, his return is evidence thereof. Where a private person served the subpœna, the affidavit should be as follows: , being duly sworn, deposes and says that he [*insert as above from the**]. *In either case, if a warrant of attachment is desired, the party or his attorney, etc., in his behalf, must make an affidavit as follows:* Being duly sworn [*or* "and deponent further"] says that the testimony of the said is material to the said plaintiff [*or* "defendant"] upon the trial of this action, and that the said has neglected [*or* "refused"] to attend as a witness in obedience to such subpœna; and that deponent knows of no just cause for such neglect *or* refusal.

[*Jurat.*] [*Signature.*]

NOTE.

If a witness, upon whom a *subpœna duces tecum* has been served, attends, but fails to produce the book or paper, he cannot be attached under Code Civ. Proc., §§ 2971–2973; but he may be summarily committed, under section 3001, until he produces the book or paper. Affidavit must show payment of legal fees, or tender thereof.

No. 50.

Attachment — Defaulting Witness.

(Municipal Court Act, § 198.)

The People of the State of New York, to any marshal of the city of New York, greeting:

Whereas, it has been made to appear to the Municipal Court of the city of New York, borough of , Judicial District, that there had been issued out of said court, in an action then pending therein in which is plaintiff and , defendant, a subpœna directed to and commanding him to appear before the said court at a time now past, and give testimony on the trial of said action,

And, whereas, due proof of the service thereof upon said has been presented to said court; and the said after having been duly called in open court, at the time and place whereby he was so directed to appear has made default in such appearance and has wholly neglected and refused to obey the mandate of said court.

These are therefore, to require you, and you and each of you are hereby required, to forthwith attach and take into your custody the body of said and him keep and retain in safe and secure custody until the day of , 190 , at the hour of M., at which time you are further required to bring and produce him before our said court at the courtroom thereof, at No. street, in the borough of , in the city of New York, to be then and there dealt with, for the cause aforesaid, as the justice thereof may direct, unless he shall give good and sufficient surety in the sum of dollars, for his appearance at such time and place, and for your doings herein this shall be your warrant, and have you then and there this writ.

Witness, , a justice of the Municipal Court of the city of New York, borough of , Judicial District, in said city, this day of , 190 .

By order of the court,

Clerk.

Allowed. *Justice.*

Order Thereon.

(See Municipal Court Act, § 5.)

The foregoing named being now present, and being by me informed of the aforesaid charge against him, and being by me requested to show good cause or sufficient excuse if any he may have why he should not be punished as for a contempt in not obeying the mandate of this court, as in the warrant of attachment hereinbefore recited and fully set forth, and failing to show any such good cause, or reasonable or sufficient excuse, is adjudged guilty of a willful disobedience of the mandate of this court, and of a contempt of court, and is hereby directed as a punishment therefor to pay a fine of dollars, and to be imprisoned in the common jail of the city of New York in the borough of , for the term of days, and until such fine be paid, or he be discharged according to law, but if such fine be not paid, such imprisonment shall not exceed thirty days, and that a commitment issue to that effect.

Dated, 190 . *Justice.*

Certificate of Marshal.

I, one of the marshals of the city of New York, hereby make return to the within warrant of attachment, that I have arrested the said , and now produce him and have admitted him to bail as required by said writ.

Dated, 190 . *Marshal.*

No. 51.

Minute of Conviction Thereon.

[*Venue.*] *ss.:*

On the day of , 190 , a defaulting witness, having been arrested and brought before the Municipal Court of the city of New York, borough of , Judicial District, by virtue of a warrant issued as prescribed in the Municipal Court Act of the city of New York, was convicted before me and fined the sum of , besides costs, for nonattendance as a witness to give evidence [*or* "for refusal to testify as a witness"] before me at the Municipal Court of the city of New York, borough of , Judicial District, on the day of , 190 , held at No. street in said city, in pursuance of a subpœna duly issued and served upon him in behalf of the plaintiff [*or* "defendant"], in an action then and there depending before me, in which was plaintiff, and was defendant.

Justice.

No. 52.

Execution to Collect Fine.

[*Venue.*] *ss.:*

The People of the State of New York, to any marshal of the city of New York, greeting:

Whereas, [*insert from the * in No. 53 to the end of the form; then add*], a minute of which conviction, the cause thereof, and the fine and costs imposed, have been entered in the docket-book of said justice; and whereas the has neglected to pay said fine and costs [*or*, "and whereas the sum of , part of the said fine and costs, remains unpaid to the said justice"], you are therefore hereby commanded to collect the said sum remaining unpaid of the goods and chattels of the said within the city of New York; and, for want thereof, to take him and convey him to the common jail of the city of New York in the borough of , there to remain until he pays such sum, not exceeding thirty days; and forthwith to bring the money collected before the said justice, and do you return this execution within days after the date hereof.

Witness my hand this day of , 190 , at , in said city.

Justice.

No. 53.

Venire.

(Municipal Court Act, § 231.)

The People of the State of New York, to any marshal of the city of New York, greeting:

We command you to summon — [24 persons.]

NAMES. } RESIDENCES.

good and lawful men of the borough of , in the city of New York, qualified to serve as jurors in courts of record, who are in nowise of kin to , the plaintiff, nor to , the defendant, between whom a controversy exists, to be and appear before the Municipal Court of the city of New York, Borough of , Judicial District, at the courtroom, No. street, in said borough in said city on the day of instant, at o'clock in the of that day, between the said parties, and have you then and there the names of the jurors and this precept.

Given under my hand, the day of , 190 .

Clerk.

No. 54.

Marshal's Return of Service Thereof.

I do hereby certify, that by virtue of the within [*or* "annexed"] venire, I have personally notified the following persons to attend as therein prescribed, as jurors to try the said action. [*Names and residences.*]

[*Date.*] *Marshal.*

No. 55.

Warrant of Commitment of Witness Attending and Refusing to be Sworn, etc.

(Municipal Court Act, § 4.)

[*Venue.*] *ss.:*

The People of the State of New York, to any marshal of the city of New York:

Whereas, on the trial of a civil action before the Municipal Court of the city of New York, Borough of , Judicial District, the undersigned, justice, this day, in which was plaintiff, and was defendant. , a witness, attending in behalf of said plaintiff before me in said action, refused to be sworn or affirmed in

the form prescribed by law [*or* "refused to answer the following pertinent and proper question," *stating the question in full; or* "neglected or refused to produce a book known as," *describing it; or* "a paper called," etc., *describing it,* "which he had been duly subpœnaed to produce," *or* "which he had been duly required to produce by an order duly made;"] and whereas, the said plaintiff made oath before me that the testimony of the said witness [*or* "that the said book" *or* "paper"] was so far material to his case, that without it he could not safely proceed with the trial of the said action; whereas, by the return of , marshal of said borough [*or* the affidavit of], it appeared that the subpœna [*or* "order"] aforesaid was duly served upon the said as required by law.

Now, therefore, you, the said marshal, are hereby commanded forthwith to convey and deliver the said into the custody of the said sheriff of said at the common jail of the city of New York in the borough of , in said city, and you the said sheriff are hereby commanded to receive the said into your custody in the said jail, and him there closely confine by virtue of this warrant, until he submits to be sworn or affirmed, as such witness as aforesaid [*or* "to answer the said question" *or* "produce the said book" *or* "paper"] *or* is otherwise discharged according to law.

[*Date.*] *Justice.*

[*Seal of court.*] *Clerk.*

No. 56.

Affidavit that Justice is a Material Witness.

(Municipal Court Act, § 13.)

[*Title of action.*]

[*Venue.*] *ss.:*

being duly sworn, deposes and says:

1. That he is the defendant in the above entitled action [*or* "special proceeding"].

or 1. That he is the attorney for the defendant in the above entitled action [*or* "special proceeding"], and that said defendant has not been arrested therein.

2. That an issue of fact has not been joined in said action [*or* "special proceeding"].

3. That the said justice before whom the said action [*or* "special proceeding"] is pending is a material witness for the defendant, without whose testimony he cannot safely proceed to trial; that he expects to prove by said justice the following facts and circumstances [*stating them particularly*]; and that deponent is unable to prove the said facts and circumstances without the testimony of the said justice.

[*Jurat.*] [*Signature.*]

No. 57.

Order Thereon.

[*Title of action.*]

Whereas, before the joinder of issue in the above entitled action [*or* "special proceeding"], satisfactory proof was presented in behalf of the defendant to me, the undersigned justice, before whom the said action [*or* "special proceeding"] is pending, by the affidavit of the said defendant [*or otherwise as the case may be*], that I am a material witness for the said defendant, without whose testimony he cannot safely proceed to trial.

Ordered, that the said action [*or* "special proceeding"] be continued before the Municipal Court of the city of New York, borough of , Judicial District.

[*Date.*] *Justice.*

No. 58.

Notice to Juror.

(Municipal Court Act, § 235.)

To Mr.

Sir.— You are hereby summoned to attend as a juror, before The Municipal Court of the city of New York, borough of , District, at the courthouse, No. , in the borough of , in said city, on the day of , at o'clock in the noon.

[*Fine for nonattendance, twenty-five dollars.*]

Dated this day of , 190 .

By order of the court. *Clerk.*

No. 59.

Undertaking to Indemnify against Lost Bill or Note.

(See Code Civ. Proc., § 1917.)

[*Title of action.*]

Whereas, this action is founded upon a promissory note, made by , the defendant, to , or bearer, for dollars, dated about the day of , 190 , which note the said alleges was lost while it belonged to him; now, therefore, we do jointly and severally undertake, pursuant to the statute, to the said in the sum of dollars, that the said will indemnify the said , his heirs and per-

sonal representatives, against any claim, by any other person, on account of such note, and against all costs and expenses, by reason of such a claim.

[*Date.*] [*Signatures.*]

[*Add acknowledgment, justification, and approval. Plaintiff need not execute the undertaking; but there must be at least two sureties. The amount to be inserted in the blank must be fixed by the justice, at not less than twice the amount of the note.*] *See Desmond* v. *Rice*, 2 Hilt. 530.

No. 60.

Examination of Sureties.

[*Title of action.*]

[*Venue.*] *ss.:*

, being duly sworn, doth depose and say, that he is the person offered for acceptance as surety in the foregoing entitled action. That he resides at No. street, in the borough of , in the city of New York, and is a holder therein and worth hundred dollars, as well over and above all claims, undertakings, liabilities, and indebtedness as over and above any property of deponent which by law is exempt from levy and sale on execution. That among other property owned by deponent in his own right, and upon which there are no claims or incumbrances except those, if any, mentioned herein, is the following, viz.:

That the personal and firm debts of deponent, including notes not due, do not exceed the sum of dollars. That there are no judgments against deponent for any sum of money, nor is there any suit now pending against deponent for any cause of action, except

That deponent is not surety or principal, upon any bond, undertaking or other obligation for the payment of any sum of money, performance of any act, duty, or contract, either for himself or another person, except

That deponent does not know of any reason, nor has he concealed any fact which if known would be a good reason, why he should not be accepted as one of the sureties aforesaid.

Sworn to before me this day of , 190 . }

[*Signature.*]

No. 61.

Transcript of Judgment.

(Municipal Court Act, § 261.)

Time of Docketing.	Names of Parties against whom Judgments have been Obtained.	Names of Parties in whose Favor Judgments have been Obtained.

Amount of Judgment.	Officer's Return on Execution.	Judgments when Satisfied.
Judgment,....$		
Costs.....$		
$		

Plaintiff's Attorney.

I certify, that the foregoing contains all the facts necessary to make a perfect docket of the judgment rendered in the Municipal Court of the city of New York, borough of , Judicial District, in the above action.

Dated, 190 . *Clerk.*

NOTE.

If required, add, in addition to the within, I further certify that the words "Not Summoned" are written upon the docket opposite or under the names of the following within named defendants.

Clerk.

No. 62.

Certificate of Satisfaction of Judgment.

[*Title of action.*]

Attorney for

Judgment rendered the day of . 190 , in favor of the

against the

For damages ..... $

For costs and extra costs ..... $

Total ..... $

The names of the defendants who were not summoned are:

[*Venue.*] *ss.:*

I, , Clerk of the Municipal Court of the city of New York, borough of , Judicial District, do hereby certify that the foregoing is a correct transcript from the docket of judgments kept in my office, of judgments rendered in said court.

I also certify that the said judgment is satisfied and discharged of record. In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said court this day of , 190 .

Clerk.

No. 63.

Warrant of Commitment.

STATE OF NEW YORK, }
CITY OF NEW YORK, } *ss.:*
Borough of . }

The People of the State of New York, to any marshal of the city of New York, and to the keeper of the common jail of , greeting:

Whereas, at a regular session of the Municipal Court of the city of New York, borough of , Judicial District, held at the courtroom thereof, in the said borough, on the day of , 190 .

Present, , a justice of the said court, while the said court was engaged in the trial of then pending in said court between , plaintiff, and , defendant, according to the statute in such case made and provided, of said borough, did, during the sitting, and in the immediate view, presence, and hearing of the said court, and while the said court was so engaged as aforesaid, contemptuously, insolently and in a disorderly manner so behave and conduct himself as to directly tend to interrupt its proceedings, and which conduct and behavior actually did interrupt the proceedings of said court, and impair the respect due its authority, by

And whereas, the said was thereupon required by the said court to answer and show cause why he should not, for the cause aforesaid, be convicted of a criminal contempt of said court and be punished therefor.

And whereas, the said did not show any such cause

And whereas, the said was thereupon, for the cause aforesaid, adjudged by the said court to be guilty of a criminal contempt of said court, and was convicted thereof by the said court, and was ordered and adjudged by the said court, as a punishment for said contempt, to pay a fine of dollars, and to be imprisoned in the common jail of the said for the term of days, and until such fine be paid or he be discharged according to law.

Now, therefore, you, the said marshal, are hereby commanded to take, convey, and deliver the said into the custody of the said keeper of the said jail; and you, the said keeper, are hereby required to receive the said into your custody in the said jail, and him there safely keep during the said term of days, and until he pay the said fine or be duly discharged according to law, and hereof fail not.

Witness, , a justice of the Municipal Court of the city of New York, Borough of , Judicial District, in the city of New York, this day of , 190 .

Clerk.

Allowed in open court. *Justice.*

By the Court. *Clerk.*

[*Seal.*]

NOTE.

(See Code Civ. Proc., § 2874; Municipal Court Act, § 4.)

No. 64.

Execution against the Property — Single Defendant.

(Municipal Court Act, § 260.)

The People of the State of New York, to any marshal of the city of New York, greeting:

Whereas, judgment was rendered on the day of , one thousand nine hundred and , in an action in the Municipal Court of the city of New York, borough of , Judicial District, before , Esq., justice, between , plaintiff, and , defendant, in favor of the said plaintiff, against the said defendant, for the sum of dollars.

And whereas, the sum of dollars is now actually due thereon:

Therefore we command you, that you collect the amount due on said judgment, out of the personal property of the said judgment debtor, and pay the same to the said and return this execution within twenty days after its issue to the said court, with a certificate thereon indorsed, stating the manner in which you have executed the same.

Witness, , Esq., a justice of said court at the borough of , the day of , one thousand nine hundred and .

Clerk.

No. 65.

Execution against the Property — Joint Debtors.

(Municipal Court Act, § 268.)

The People of the State of New York, to any marshal of the city of New York, greeting:

Whereas, judgment was rendered on the day of , one thousand nine hundred and , in an action in the Municipal Court of the city of New York, borough of the , Judicial District, before , Esq., justice, between , plaintiff, and , defendant, in favor of the said plaintiff against the said defendant, , for the sum of dollars.

And whereas, the sum of dollars, is now actually due thereon,

Therefore we command you, that you collect the amount due on said judgment out of the personal property of the said judgment debtor and the separate property of the judgment debtor upon whom the summons herein was served, and pay the same to the said plaintiff and return this execution, within twenty days after its receipt by you, to the said Court, with a certificate thereon indorsed, stating the manner in which you have executed the same.

Witness, , Esq., a justice of said court, at the borough of , the day of , one thousand nine hundred and .

Judgment, $

Costs,

Extra costs,

Clerk.

Indorsement.

The officer executing this process will take notice that the following-named defendants were not personally served with a summons herein, viz.:

and that as to them, the execution thereof must be restricted as below prescribed.

An execution against property shall not be levied upon the sole property of such a defendant, but it may be collected out of personal property owned by him jointly with the other defendants who were summoned, or with any of them, and out of the real and personal property of the latter, or of any of them.

Clerk.

No. 66.

Execution against the Person.

(Municipal Court Act, §§ 271, 272.)

The People of the State of New York, to any marshal of the city of New York, greeting:

Whereas, judgment was rendered on the day of , one thousand nine hundred and , in an action in the Municipal Court of the city of New York, borough of , Judicial District, before , Esq., justice, between , plaintiff, and , defendant, in favor of the said , against the said , for the sum of dollars.

And whereas, the sum of is now actually due thereon;

Therefore, we command you, that you collect the amount due on said judgment out of the personal property of the said judgment debtor.

And, if sufficient property of the said defendant liable to execution, cannot be found wherewith to satisfy the said judgment, you are further commanded to arrest the said defendant, and commit him to the common jail of the city of New York, in the borough of , the keeper whereof is hereby commanded to receive the said defendant and him safely keep until he shall pay the judgment or be discharged according to law; and return this execution within twenty days after its receipt by you to the said Court, with a certificate stating the manner in which you have executed the same.

Witness, , Esq., a justice of said court, at the borough of , in the city of New York, the day of , one thousand nine hundred and .

Clerk.

NOTE.

See also note under Form No. 65 as to "Indorsement."

No. 67.

Execution in Favor of Wage-Earners.

(Municipal Court Act, § 274.)

[*Venue.*] *ss.:*

The People of the State of New York, to any marshal of the city of New York, greeting:

Whereas, , plaintiff, lately before the Municipal Court of the city of New York, borough of , Judicial District, at the courthouse in said borough recovered against , in a certain action, the sum of dollars, damages and

costs; and whereas, an execution against the property of said defendant was in due form of law issued by the clerk of said court to one of the marshals of the city of New York, and the same having been returned unsatisfied by such marshal;

And whereas, the action is one of those referred to in section 274 of the Municipal Court Act (Laws 1902, chap. 580);

Now, therefore, we command you forthwith to take the body of the said defendant and him safely convey to the common jail of the city of New York in the borough of ; the keeper whereof is hereby commanded to receive the said defendant, and safely keep and imprison until he shall pay the amount of said judgment and costs, together with the marshal's and jailer's fees; but such imprisonment shall not exceed fifteen days, and the said jailer shall return this precept to the clerk of the said court, after the expiration of said fifteen days, with his return thereon indorsed.

Witness, , our said justice at the place aforesaid, the day of , 190 .

Clerk.

NOTE.

No property is exempt from levy and sale under an execution issued under this section.

No. 68.

Indemnity Bond.

Know all men by these presents, that we, , and , are held and firmly bound unto , a marshal of the city of New York, in the sum of dollars, lawful money of the United States of America, to be paid to the said , or to his certain attorney or attorneys, executors, administrators, or assigns. For which payment, well and truly to be made, we bind ourselves, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals. Dated the day of , in the year one thousand nine hundred and .

Whereas, the above-bounden did obtain judgment in the Municipal Court of the city of New York, borough of , Judicial District, against , whereupon execution has been issued, directed, and delivered to the said , marshal aforesaid, requiring him, out of the personal property of the said judgment debtor, to satisfy the judgment aforesaid. And whereas, certain personal property that appears to belong to the said , said judgment debtor, is claimed by one ;

Now, therefore, the condition of the above obligation is such, that if the above-bounden shall well and truly save, keep, and bear harmless, and indemnify the said , and all and every person and persons aiding and assisting him in the premises, of and from all harm, let, trouble, damage, liability, costs, counsel fees, expenses, suits, actions, judgments, special proceedings, and executions that shall or may at any time arise, come, accrue, happen, or be brought against him, them, or any of them, as well for the levying and making sale under and by virtue of such execution, of all or any personal property which he or they shall or may judge to belong to the said judgment debtor, as well as in entering any shop, store, building, or other premises, for the taking of any such personal property, then this obligation to be void; otherwise to remain in full force and virtue.

Sealed and delivered in the presence of } [L. S.]

[L. S.]

[*Affidavits and acknowledgments.*] [L. S.]

No. 69.

Undertaking on Removing Cause to the City Court of the City of New York.

(Municipal Court Act, § 3.)

[*Title of action.*]

Whereas, the above-named plaintiff has commenced an action in this court, for a cause of action arising under the Municipal Court Act of the city of New York, and in which the claim or demand of the plaintiff exceeds the sum of two hundred and fifty dollars; and the defendant having appeared and joined issue therein, and before an adjournment has been granted upon his application, having applied for the removal of this action to the City Court of the city of New York, pursuant to the provisions of the said act;

Now, therefore, we , the above-named defendant, and , of street, and , of street, of the borough of , have, and hereby do, in consideration of the premises aforesaid, and of one dollar to us in hand paid, jointly and severally undertake that we will pay to the plaintiff the amount of any judgment that may be recovered against the defendant in said City Court of the city of New York in this action.

Dated , 190 .

In presence of [*Signatures.*]

[*Venue.*] ss.:

and , being duly sworn, doth depose and say, each for himself, that they reside , at No. street, in the borough of , in the city of New York, and are each holders therein, and are each worth dollars, as well over and above all claims, undertakings, liabilities, and indebtedness, as over and above the property of deponent, which by law is exempt from sale by execution.

Sworn to, this day of , 190 , before me }

[*Signature.*]

On this day of , 190 , before me personally came and , to me known to be the individuals described in, and who executed, the foregoing undertaking, and who severally acknowledged that they executed the same, and for the purpose therein mentioned.

Notary Public, County.

I hereby approve of the within undertaking as to form and as to the sufficiency of the sureties. Amount fixed at dollars.

Dated , 190 . *Justice.*

No. 70.

Order Removing Action.

[*Title of action.*]

Whereas, the above-named plaintiff has commenced an action in this court against the above-named defendant, for a cause of action specified in the Municipal Court Act of the city of New York, and the damages claimed therein exceed the sum of two hundred and fifty dollars, and the defendant ha appeared and joined issue therein and no adjournment has been had upon the application of the said defendant; and whereas, the said defendant has applied to a justice of said court for an order removing the action into the City Court of the city of New York, pursuant to the provisions of the said act, and has given the undertaking required by statute, which undertaking with the sureties therein has been duly approved.

Now therefore, it is ordered, pursuant to the said act, in such case made and provided, that this action be and the same is hereby removed into the said City Court of New York.

Dated , 190 . *Justice.*

No. 71.

Affidavit to Obtain Order to Plead.

[*Title of action.*]

[*Venue.*] *ss.:*

, being duly sworn, deposes and says that he is the attorney for the plaintiff in this action, which was originally commenced in the Municipal Court of the city of New York, borough of , Judicial District, on the day of , 190 , for an amount exceeding the sum of two hundred and fifty dollars, and that after issue joined and before trial, the defendant filed the usual undertaking according to the statute in such case made and provided, and removed the action into this court; that the pleadings in the court below were oral and not in writing. [*State no previous application has been made as in Form No.* 6.]

Sworn to before me, this day of , 190 .

[*Signature.*]

No. 72.

Order to Plead.

At a Special Term, etc.

[*Title of action.*]

On reading and filing the annexed affidavit, and on motion of , attorney for the plaintiff herein, it is hereby ordered, that the plaintiff in this action serve his complaint in writing on the defendant within six days after the service of a copy of this order, and that the defendant within six days thereafter serve an answer thereto, and that the cause afterward proceed as an action originally commenced in this court.

[*Signature of judge.*]

No. 73.

Notice of Appeal.

(Municipal Court Act, §§ 310–327.)

[*Title of action.*]

Take notice that the defendant hereby appeals to the Appellate Term of the Supreme Court of New York, city and county of New York,* from the judgment rendered against him in the above-

* If in Second Department, say "to the Appellate Division."

entitled action, in favor of the plaintiff , on the day of , 190 , for the sum of dollars, damages and costs, and from the whole and each and every part of such judgment.

Dated , 190 .

To , Esq., plaintiff and respondent, and , Esq., clerk.

Yours, etc.,

Attorney for defendant and appellant.

No. 74.

Undertaking on Appeal to Secure Stay of Execution.

(Municipal Court Act, § 314.)

[*Title of action.*]

Whereas, on the day of , 190 , in the above-named court, , the above-named respondent, recovered a judgment against , the above-named appellant, for ;

And the above-named appellant, feeling aggrieved thereby, intends to appeal therefrom to the Appellate Term of the Supreme Court of New York city and county of New York [*or Appellate Division, Second Department*];

Now therefore, we, , of No. street, in the of , and of No. street, in said borough, do hereby, pursuant to the statute in such case made and provided, undertake, that if the said appeal is dismissed, or if judgment is recovered against the said appellant in the said appellate court, and an execution issued thereupon is returned wholly or partly unsatisfied, we will pay the amount of the said judgment, or the portion thereof remaining unsatisfied, not exceeding the sum of dollars.

Dated , 190 .

[*Venue.*] *ss.:*

, one of the subscribers to the foregoing undertaking, being duly sworn, says that he is a resident and holder within this State, and is worth the sum of dollars, over all his debts and liabilities, and exclusive of property exempt by law from execution.

Sworn to before me, this day of , 190 .

I certify, that on this day of , 190 , before me personally appeared the above-named , known to me to be the individuals described in and who executed the above undertaking, and severally acknowledged that they executed the same.

Notary Public, County.

NOTE.

One or more sureties in a sum of at least one hundred dollars, and not less than twice the amount of the judgment to be approved by a justice of the court. A copy of the undertaking with a notice of the delivery thereof, must be served with the notice of appeal and in like manner. Section 1335 of the Code of Civil Procedure applies to this undertaking.

If the judgment appealed from is for the recovery of a chattel, the undertaking must be to the effect that the sureties will pay the sum fixed by that judgment as the value of the chattel, together with the damages, if any, awarded for the taking, withholding, or detention thereof.

NOTES.

As to form of Justice's Return on Appeal, see Code Civ. Proc., § 3050, *ante.*

As to form of Undertaking as condition of opening "Default," see Municipal Court Act, §§ 253, 254, 255, 256.

No. 75.

Return of Justice.

(See Municipal Court Act, § 317.)

To the Supreme Court, Appellate Term [or *Appellate Division*], *Judicial Department, for hearing of appeals from the Municipal Court of the city of New York, borough of , Judicial District:*

. An appeal having been taken from the judgment heretofore rendered in a certain action wherein w plaintiff and w defendant , tried, on the day of , A. D. 190 , before me , in the Municipal Court in the city of New York, borough of , District;

I, , justice of said court, do, pursuant to the statute in such case made and provided, hereby respectfully return the testimony, proceedings, and judgment in the said action.

On the day of , 190 , a summons was issued out of the Municipal Court in the city of New York for the borough of , Judicial District, signed by the clerk of the said court, a copy thereof being hereunto annexed.

[Said summons not having been served within the time required by law, *alias summons* were thereupon issued from time to time, the last of which being returnable on the day of , 190 .]

The said summons has indorsed upon it the following:
City and County of New York, *ss.:*

On the day of , I served the within summons in the city of New York, on the within-named defendant in person at No. by delivering to and leaving with a true copy thereof, and at the same time showing the within original, and that I know the person served to be the defendant therein named.

Marshal.

or,

City and County of New York, *ss.:*

, being duly sworn, says that on the day of , 190 , at No. in said city, he served the within summons on , the defendant therein named, by delivering to and leaving with a true copy thereof, and at the same time showing the within original; that he knew the person so served to be the person described in said summons as defendant therein; that deponent is twenty-one years of age, and a resident of said city.

Sworn before me, this day of , 190 .

I further certify, that on the said day of , 190 , the same being the day mentioned in said summons for the return thereof, the parties therein named respectively appeared, to-wit: the plaintiff by , Esq., of counsel, and the defendant by , Esq., of counsel, and the said plaintiff complained against the said defendant as follows: and the said defendant answered as follows:

Issue being thus joined between the parties, the said cause was thereupon adjourned by until the day of , 190 , at o'clock in the noon, and thereafter from time to time until the day of , 190 .

On the said day of , 190 , both parties again appeared, and [*a jury having been duly demanded and empaneled*] the said cause was tried.

The exhibits used on the said trial are annexed and the evidence given on said trial is as follows:

The case here closed, and I thereupon, to-wit, on the day of , 190 , rendered judgment in favor of the and against the , for $ damages, besides $ costs, and $ extra costs, making a total of dollars.

All of which is respectfully submitted.

Dated New York, , 190 .

Justice of the Municipal Court of the City of New York, Borough of , Judicial District.

No. 76.

Warrant in Action to Foreclose a Lien on a Chattel.

(Municipal Court Act, §§ 137, 138.)

City and County of New York, *ss.:*

The People of the State of New York, to any marshal of the city of New York to whom the annexed summons is delivered, greeting:

Whereas, has made application to the Municipal Court of the city of New York, borough of , District, for a warrant of attachment in favor of against certain property in said application, and the mortgage accompanying the same described, according to the provisions of the Code of Civil Procedure and the Municipal Court Act of said city relating thereto, for a debt or demand of dollars, and cents, being the amount sworn to by the applicant, which debt arose upon , and to secure the payment whereof the said mortgage was made and delivered, and requisite proof by affidavit, and undertaking with sufficient surety having been executed. You are therefore required to seize and attach on or before the day of , 190 , being the sixth day before the return day of the summons hereunto annexed, the goods and chattels in the said mortgage described and named in the schedule indorsed hereon, and safely keep the same to abide any judgment that may be recovered in this action. And do you make return of your proceedings hereon to the said court at the courtroom in said city, at the time when the summons issued herein is returnable, and have you then and there this precept.

Issued by order of the court, this day of , 190 .

Clerk of said court.

Granted and allowed this day of , 190 .

Justice.

No. 77.

Judgment in Action to Foreclose Lien.

(Municipal Court Act, § 141.)

I find that the plaintiff has a lien on said chattels for the sum of $, and render judgment for the plaintiff for the amount thereof, to-wit: $ damages, besides $ costs, and $ extra costs, and direct that the officer to whom an execution herein may be directed sell the chattels mentioned in said mortgage, and satisfy said lien and the costs, and that the proceeds of such sale, less his fees and expenses, be applied to the payment of said lien and the costs of this action, and that any surplus money received therefrom be paid to the clerk of the court for the benefit of the owner, if the safe-keeping thereof is necessary.

Dated , 190 . *Justice.*

No. 78.

Execution against the Property — Mechanic's Lien.

The People of the State of New York, to any marshal of the city of New York, greeting:

Whereas, judgment was rendered on the day of , one thousand nine hundred and , in an action in the Municipal Court of the city of New York, borough of , District, before , justice, between , plaintiff, and , defendant, in favor of the said plaintiff against the said defendant , for the sum of dollars.

And whereas, said judgment was rendered pursuant to the acts of the Legislature of the State of New York, in an action to enforce a mechanic's lien against the following premises, viz.:

And it appears by the complaint on file and forming part of said judgment-roll that on the day of , 190 , a notice of such lien was duly filed with the clerk of the county of New York, wherein the above-named defendant was described as the owner of said premises, and it further appearing that the sum of dollars is now actually due upon said judgment;

Therefore, we command you, that you collect the amount due on said judgment out of the personal property of the said judgment debtor and the separate property of the judgment debtor upon whom the summons herein was served and pay the same to the said plaintiff .

And you are hereby further commanded in default of such collection to sell the right, title, and interest of said defendant in and to said above-described premises upon which the claim set forth in said complaint was a lien at the time of the filing of the notice prescribed, and out of the proceeds thereof to satisfy the said judgment. And you are to return this execution, within twenty days after its receipt by you, to the said court, with a certificate thereon indorsed, stating the manner in which you have executed the same.

Witness, Esq., justice of said court, at the city of New York, the day of , one thousand nine hundred and

Judgment, $
Costs,
Extra costs,

Clerk.

No. 79.

Affidavit and Order for Substituted Service, and Affidavit of Service Thereof.

(Municipal Court Act, §§ 32, 33, 34, 35.)

[*Title and venue.*]

, being duly sworn, says that he is the attorney for the above plaintiff; that the summons in this action was issued on the day of , 19 ; that said defendant resides at No. , borough of , city of New York; that an alias summons was duly issued in said action on the day of , 19 ; that proper and diligent effort has been made to serve the summons upon the defendant ; that the place of his sojourn cannot be found and personal service cannot be made, or [*that he is within the city and avoids service so that personal service could not be made*], as will more fully appear by the affidavit of , who is a person not a party to the action, and the return of , one of the marshals of the city of New York, both of which are hereto annexed and made a part hereof.

Wherefore deponent asks that an order may be made by this court for the service of the summons in this action upon the defendant , pursuant to the provisions of chapter 580 of the Laws of 1902. [*No previous application, etc., as in Form No.* 6.]

Sworn to before me, this day of , 19 .

NOTE.— Annex the affidavit of a person not a party to the action, and the return of a marshal showing in detail what efforts were made to effect personal service, in order that the court may be satisfied that proper and diligent efforts were made.

Order.

[*Title.*]

Upon satisfactory proof by the affidavit of , attorney for the above plaintiff, verified , and the affidavit of , a person not a party to the action, verified , and the return of , one of the marshals of the city of New York, dated , that the defendant , resides within the city of New York, to-wit, at No. , in the borough of , in said city of New York; that said action was brought in this court, in the borough of district; that the summons therein was issued on the day of ,

19 ; that an alias summons was duly issued on the day of , 19 ; that proper and diligent effort has been made to serve the summons upon the defendant , and that the place of his sojourn cannot be found so that personal service could not be made, [*or that he is within the city and avoids service, so that personal service could not be made*].

Ordered, that the service of the summons [*and complaint*] herein on the defendant , be made by leaving a copy thereof, and of the order, at No. , in the borough of , in said city, being the last known place of residence of the defendant , with a person of proper age, if upon reasonable application, admittance can be obtained, and such person found who will receive it, or, if admittance cannot be obtained, nor such a person found, by affixing the same to the outer or other door of the defendant's residence, and by depositing another copy thereof, properly inclosed in a post-paid wrapper, addressed to him, at his place of residence, in a post office in the borough in which he was last known to reside.

Affidavit of Service.

[*Title and venue.*]

, being duly sworn, deposes and says that he is of the age of , and upwards; that on the day of , 19 , at the city of New York, he served the summons [*and complaint*] in the above action on the defendant therein, according to the order of the court, dated the day of , 19 , by leaving a copy of said summons [*and complaint*], and of said order at No. , in the borough of , in said city, being the last known place of residence of the defendant, with , a person of proper age, to wit, of the age apparently of years, on the day of , 19 , at o'clock on said day, deponent having made application at said time for admittance to said premises, and having obtained admittance and finding such person there and who received the same [*or, that he could not obtain admittance, nor find such a person and affixed the same to the outer or other door of the defendant's residence*]. That on the same day he deposited another copy of said summons [*complaint*] and order, properly inclosed in a post-paid wrapper, addressed to said defendant at his said last known place of residence, at , being a post office in the borough in which said defendant was last known to reside. Deponent further says that he knew the person so served as aforesaid to be the same person mentioned and described as defendant in said summons.

Sworn to before me, this day of , 19 .

No. 80.

Undertaking on Opening Default.

(Municipal Court Act, § 256.)

[*Title of action.*]

Whereas, on the day of , 190 , in the Municipal Court of the city of New York, borough of , District, judgment was rendered in the above-entitled action on default in favor of plaintiff against said , defendant;

And whereas, on motion of said defendant said court, by an order herein dated the day of , 190 , opened said default and allowed said defendant to come in and defend said action on condition that he give the undertaking in such case required by statute;

Now, therefore, said defendant, , as principal, and and , as sureties, do hereby jointly and severally undertake to the said plaintiff, pursuant to the statute in such case made and provided, that such defendant will not sell, assign, or transfer any of his property with intent to hinder, delay, or defraud the plaintiff in the collection of his claim or demand herein if the plaintiff shall prevail on the trial of said action, and that we will pay the amount of any judgment recovered against such defendant in such action.

Dated.

[Add affidavits of qualification and acknowledgment.]

No. 81.

Affidavit as to Costs and Disbursements.

(Municipal Court Act, § 344.)

[*Title of action.*]

, being duly sworn, says that he is the attorney for the in said action. That the witness fees herein amount to dollars. That the witnesses, , , were in actual attendance upon the trial of said action in this court days, to-wit, on . That the travel fees charged amount to dollars. That the distances for which they are claimed are as follows:

That the copy of was actually and necessarily used, or was necessarily obtained for use. That the item of disbursements was necessarily incurred, and is reasonable in amount.

[*Jurat.*]

NOTE.—For forms as to "Interpleader," "Confession of judgment," "*Remittitur*," and other forms, see Abbott's Forms.

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[WHOLE NUMBER OF PAGES, 662.]

SUPPLEMENT TO THE FIFTH EDITION

OF

LANGBEIN'S

LAW AND PRACTICE

OF THE

MUNICIPAL COURT

OF THE

CITY OF NEW YORK

CONTAINING

THE AMENDMENTS TO "THE MUNICIPAL COURT ACT OF THE CITY OF NEW YORK" (LAWS 1902, CHAP. 580), "THE GREATER NEW YORK CHARTER" (LAWS 1901, CHAP. 466) RELATIVE TO SAID COURT, CHANGES IN THE JUSTICES, CLERKS, COURT OFFICIALS AND MARSHALS, THE LATEST RULES OF PRACTICE, AND RELATIVE TO CLERKS AND ATTENDANTS, AND DECISIONS AFFECTING THIS COURT SINCE AUGUST, 1902,

BY

LANGBEIN BROTHERS
COUNSELLORS-AT-LAW

GEORGE F. LANGBEIN J. C. JULIUS LANGBEIN

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CHARTER AND MUNICIPAL COURT AMENDMENTS SINCE AUGUST, 1902

AMENDMENTS to "The Greater New York Charter" (Laws 1901, Chap. 466) affecting the Municipal Court.

LAWS 1903, Chapter 645.

LAWS 1905, Chapters 730, 758.

AMENDMENTS to the Municipal Court Act (Laws 1902, Chap. 580).

LAWS 1903, Chapters 144, 156, 282, 431.

LAWS 1904, Chapters 93, 264, 598, 625, 682, 735.

LAWS 1905, Chapters 73, 125, 228, 513, 622,

ADDENDA NOTE.

The statute as to sale of merchandise in bulk (*Laws* 1902, *chap.* 528) has been declared unconstitutional by the Court of Appeals in *Wright as Trustee v. Hart.* (*See N. Y. Law Journal, October* 16, 1905.) The decisions under this statute cited on pages 47, 48, and 76 are therefore no longer the law.

THE MUNICIPAL COURT

OF THE

CITY OF NEW YORK.

NAMES OF THE JUSTICES, CLERKS, COURT OFFICIALS, AND MARSHALS, WITH THEIR RESIDENCES, DAYS AND PLACES OF HOLDING COURT, AND TELEPHONE NUMBER.

BOROUGH OF THE BRONX.

FIRST JUDICIAL DISTRICT.

Court held at Town Hall, Main Street, Westchester.
Trial days, Tuesday and Friday.

Justice, WILLIAM W. PENFIELD, Wakefield.
Clerk, THOMAS F. DELEHANTY, White Plains Ave., Williamsbridge.
Assistant Clerk, WILLIAM D. MILLER, White Plains Ave., Wakefield.
Stenographer, LUCIUS W. HOW, Bronxwood Park, Williamsbridge.
Attendants, STEPHEN COLLINS, City Island, New York city.
JOHN H. COMAN, Poplar St., Westchester.
TIMOTHY SULLIVAN, East Chester Road, Westchester.
Fireman, PATRICK CLARK, No. 833 Washington Ave., Bronx.
Janitor, DANIEL SCHWEGLER, No. 1254 Franklin Ave., Bronx.
Marshal, MATHEW F. MULVIHILL, No. 1991 Lexington Ave., Manhattan.
No telephone.

SECOND JUDICIAL DISTRICT.

Court held at southwest corner of 158th St. and 3d Ave.
Trial days, every day except Saturday, Sunday, and legal holidays.

Justice, JOHN M. TIERNEY, Southern Boulevard, near Valentine Ave.
Clerk, THOMAS A. MAHER, No. 1346 Fulton Ave.
Assistant Clerk, JOHN MONAGHAN, 166th St. and Sherman Ave.
Stenographer, WM. M. BROWNE, Hunts Point.

Interpreter, ROBERT VOLLBRACHT, No. 674 East 144th St.
Attendants, LOUIS F. SCOFIELD, No. 39 Boston Ave.
PETER KOELBLE, No. 883 Forest Ave.
FREDERICK JOHNSON, No. 670 East 144th St.
Marshals, THOS. MCLAUGHLIN, No. 711 East 158th St.
DAVID W. ERSKINE, No. 706 East 158th St.
GEORGE DONNELLY, 158th St. and 3d Ave.
Telephone, 1059 Melrose.

BOROUGH OF MANHATTAN.

FIRST JUDICIAL DISTRICT.

Court held at 128 Prince St.
Trial days, Tuesday, Wednesday, Thursday, and Friday.

Justice, WAUHOPE LYNN, No. 19 King St.
Clerk, THOMAS O'CONNELL, No. 437 Canal St.
Assistant Clerk, DOMINICK F. MULLANEY, No. 71 Charlton St.
Stenographer, EDWARD C. MANNERS, No. 968 St. Nicholas Ave.
Interpreter, EDWARD HERBERT, No. 282 Broome St.
Attendants, CHARLES KERNER, No. 74 Beach St.
MICHAEL BRENNAN, No. 584 Broome St.
JOHN J. MCGRATH, No. 20 Greenwich St.
Janitor, PATRICK J. KANE, No. 128 Prince St.
Marshal, EDWARD J. HEALEY, No. 42 Barrow St.
Telephone, 1430 Spring.

SECOND JUDICIAL DISTRICT.

Court held at 59 Madison St.
Trial days, every day except Sunday and legal holidays.

Justice, JOHN HOYER, appointed by the Mayor, No. 26 Oliver St.
Clerk, FRANCIS MANGIN, No. 285 Mott St.
Assistant Clerk, JAMES P. DIVVER, No. 88 Madison St.
Stenographer, CHARLES J. DORAN, No. 340 East 18th St.
Attendants, HUGH TAGGERT, No. 222 East 5th St.
JAMES MCCULLOUGH, No. 73 Centre St.
CHARLES D. PERRY, No. 289 Grand St.
Janitor, JOSEPH RAMSEY, No. 611 9th Ave.
No telephone.

THIRD JUDICIAL DISTRICT.

Court held at 125 6th Ave.
Trial days, daily except Sundays and legal holidays.

Justice, WILLIAM F. MOORE, No. 111 West 11th St.
Clerk, DANIEL WILLIAMS, No. 66 West 10th St.
Assistant Clerk, THOMAS E. GORMAN, No. 103 Bank St.
Stenographer, VALENCOURT S. LILLIE, No. 30 East 10th St.
Attendants, DANIEL B. MURPHY, No. 448 West 14th St.
MICHAEL BERGIN, No. 56 Bank St.
JOHN J. GALLAGHER, No. 32 Leroy St.
Janitor, DANIEL MOONEY, No. 15 St. Luke's Place.
Marshal, J. T. PANGBURN, Court House.
Telephone, 2396 Chelsea.

FOURTH JUDICIAL DISTRICT.

Court held at northeast corner of 2d Ave. and 1st St.
Trial days, Monday, Tuesday, Wednesday, Thursday, and Friday.

Justice, GEORGE F. ROESCH, No. 109 East 10th St.
Clerk, ANDREW LANG, No. 159 East 3d St.
Assistant Clerk, WILLIAM DOPF, No. 125 2d Ave.
Stenographer, CALEB H. REDFERN, No. 257 West 54th St.
Attendants, MICHAEL G. MURRAY, No. 165 East 54th St.
JAMES J. SKIFFINGTON, No. 453 East 10th St.
ANDREW J. HUGHES, No. 10 St. Mark's Place.
Janitor, JOHN ROONEY, No. 30 1st St.
Interpreter, ISIDORE LOEWY, No. 157 East 3d St.
Marshals, JACOB SUBIN, No. 29 1st St.
I. VAN LEE, No. 30 1st St.
JOSEPH ETHOR, No. 34 1st St.
A. C. LOREY, No. 34 1st St.
No telephone.

FIFTH JUDICIAL DISTRICT.

Court held at 154 Clinton St.
Trial days, every day except Saturday, Sunday, and legal holidays.

Justice, BENJAMIN HOFFMAN, No. 271 7th St.
Clerk, THOMAS FITZPATRICK, No. 258 Henry St.
Assistant Clerk, JAMES H. SHEILS, No. 283 East Broadway.

Stenographer, LOUIS POSNER, No. 17 Rivington St.
Interpreter, JACOB KATZ, No. 160 East 72d St.
Attendants, CHARLES NEUMAN, No. 64 Avenue C.
JAMES MCALARNEY, No. 438 East 116th St.
PATRICK REILLY, No. 168 Delancy Place, Bronx.
Janitor, JOSEPH ROSE, No. 154 Clinton St.
No telephone.

SIXTH JUDICIAL DISTRICT.

Court held at 407 2d Ave.
Trial days, every day except Sunday and legal holidays.

Justice, DANIEL F. MARTIN, No. 245 East 33d St.
Clerk, ABRAM BERNARD, No. 956 Broadway.
Assistant Clerk, JAMES FOLEY, No. 314 East 19th St.
Stenographer, ISAAC E. GARVEY, No. 689 Greenwich St.
Attendants, LAWRENCE COLLINS, No. 233 East 30th St.
ALBERT GOETTMAN, No. 304 East 18th St.
TERENCE S. RIELLY, No. 244 East 37th St.
Janitor, JOHN S. RYAN, No. 333 2d Ave.
Interpreter, HENRY ALSHEIMER, 417 East 15th St.
No telephone.

SEVENTH JUDICIAL DISTRICT.

Court held at 151 East 57th St.
Trial days, every day except Saturday, Sunday, and legal holidays.

Justice, HERMAN JOSEPH, No. 121 East 64th St.
Clerk, EDWARD A. MCQUADE, No. 1328 Lexington Ave.
Assistant Clerk, THOMAS M. CAMPBELL, No. 1183 3d Ave.
Stenographer, STEWART LIDDELL, No. 151 East 40th St.
Attendants, EDWARD T. FORAN, No. 214 East 90th St.
PATRICK CUNNINGHAM, No. 8 East 85th St.
WILLIAM FARLEY, No. 1357 2d Ave.
Janitor, IKE ADAMSHITZ, No. 151 East 57th St.
No telephone.

EIGHTH JUDICIAL DISTRICT.

Court held at northwest corner 23d St. and 8th Ave.
Trial days, daily except Saturday, Sunday, and legal holidays.

Justice, JAMES W. McLAUGHLIN, No. 234 West 34th St.
Clerk, HENRY MERZBACH, No. 259 West 34th St.
Assistant Clerk, PETER J. GARVEY, No. 346 West 22d St.
Stenographer, HAROLD EYRE, No. 155 West 22d St.
Interpreter, ELIAS KAPLAN, No. 212 Clinton St.
Attendants, CHARLES J. GEIGER, No. 432 East 89th St.
DANIEL WALSH, No. 449 East 86th St.
JOHN J. SHEEHAN, No. 361 West 15th St.
Janitor, EDGAR W. CHICHESTER, No. 2270 7th Ave.
Marshals, JAMES W. SLATER, No. 264 8th Ave.
JAMES W. KETCHAM, No. 264 8th Ave.
No telephone.

NINTH JUDICIAL DISTRICT.

Court held at 170 East 121st St.
Trial days, every day except Saturday, Sunday, and legal holidays.

Justice, JOSEPH P. FALLON, No. 103 East 116th St.
Clerk, WILLIAM J. KENNEDY, No. 64 East 130th St.
Assistant Clerk, PATRICK J. RYAN, No. 172 East 94th St.
Stenographer, GEORGE ZIEGER, No. 51 West 128th St.
Attendants, CHARLES L. LAMBERT, No. 110 West 129th St.
JOHN GOLDEN, No. 514 East 114th St.
ISAAC SILVERBLATT, No. 207 East 124th St.
Interpreter, EUGENE DUMAS, No. 152 West 100th St.
No telephone.

TENTH JUDICIAL DISTRICT.

Court held at 312 West 54th St.
Trial days, every day except Saturdays and legal holidays.

Justice, THOMAS E. MURRAY, No. 305 West 46th St.
Clerk, MICHAEL SKELLY, No. 442 West 51st St.
Assistant Clerk, GEORGE SEXTON, No. 1961 Broadway.
Stenographer, WILLIAM C. BOOTH, No. 59 West 76th St.

Attendants, CORNELIUS FOLEY, No. 342 West 47th St.
THOMAS P. CAMPBELL, No. 408 West 40th St.
JOHN F. ULRICH, No. 22 West 60th St.
Interpreter, WALTER KOLTENGEN, No. 75 Waverly Place.
No telephone.

ELEVENTH JUDICIAL DISTRICT.

Court held at 70 Manhattan St., New York city.
Trial days, Monday, Tuesday, Wednesday, Thursday, and Friday.

Justice, FRANCIS J. WORCESTER, No. 462 West 144th St.
Clerk, HEMAN B. WILSON, No. 661 West 183d St.
Assistant Clerk, ROBERT ANDREWS, No. 2139 7th Ave.
Stenographer, HARRY W. WOOD, No. 770 St. Nicholas Ave.
Interpreter, VALENTINE J. HAHN, No. 458 West 131st St.
Attendants, THOMAS H. MCCARRICK, No. 358 West 116th St.
FRANK MCGRATH, No. 498 West 133d St.
CHARLES J. CALLAGHAN, No. 185 Audubon Ave.
Marshals, FRANK C. MERKLEE, Court House.
FRANK C. LANGLEY, Court House.
Telephone, 299 Morningside.

TWELFTH JUDICIAL DISTRICT.

Court held at 2630 Broadway, near 100th St.
Trial days, Monday, Tuesday, Wednesday, and Friday.
Wednesday — Jury Day.

Justice, ALFRED P. W. SEAMAN, Court House.
Clerk, JAMES V. GILLOON, No. 160 West 106th St.
Assistant Clerk, JOHN H. SERVIS, No. 100 Convent Ave.
Stenographer, JAMES E. LYNCH, No. 41 Bethune St.
Interpreter, MAX RECHNITZER, No. 993 Ogden Ave.
Attendants, JOSEPH H. BOYLAN, No. 326 West 23d St.
OTTO H. KEIMLING, No. 344 West 47th St.
No telephone.

THIRTEENTH JUDICIAL DISTRICT.

Court held at 200 East Broadway.
Trial days, Monday, Tuesday, Wednesday, Thursday, and Friday.

Justice, LEON SANDERS, No. 11 Attorney St.
Clerk, JAMES J. DEVLIN, No. 2 Mangin St.
Assistant Clerk, MICHAEL H. LOONEY, No. 203 Monroe St.
Stenographer, ADDISON KAVANAGH, No. 278 Henry St.
Attendants, HERMAN FRIED, No. 118 Avenue C.
EDWARD H. DINAN, No. 291 Madison St.
THOMAS B. FROST, No. 944 8th Ave.
Janitor, WILLIAM WAGNER, No. 50 Broome St.
Interpreter, MYRON S. YOCHELSON, No. 246 Henry St.
Telephone, 743 Orchard.

BOROUGH OF BROOKLYN.

FIRST JUDICIAL DISTRICT.

Court held at northwest corner of State and Court Sts., Brooklyn.
Trial days, Monday, Tuesday, Wednesday, Thursday, Friday.

Justice, JOHN J. WALSH, No. 289 Bridge St., Brooklyn.
Clerk, EDWARD MORAN, No. 242 Clinton St., Brooklyn.
Assistant Clerk, JAMES A. DUNNE, No. 56 First Place, Brooklyn.
Stenographer, DUDLEY J. FAGAN, No. 1461 Dean St., Brooklyn.
Attendants, MATTHEW J. DOWD, No. 329 Bradford St., Brooklyn.
CHARLES KOCH, No. 459 Pulaski St., Brooklyn.
JOHN J. MCMANUS, No. 425 Grand St., Brooklyn.
Interpreter, JOSEPH FLASH, No. 378 Hancock St., Brooklyn.
Janitor, JAMES MAHN, No. 175 State St., Brooklyn.
Marshals, JOHN H. REARDON, No. 108 Court St., Brooklyn.
JOHN IRVIN, No. 196 State St., Brooklyn.
EUGENE MCCARTHY, No. 185 State St., Brooklyn.
ARTHUR STUBER, No. 82 Court St., Brooklyn.
No *telephone*.

SECOND JUDICIAL DISTRICT.

Court held at 495 Gates Ave.
Trial days, every day except Saturday, Sunday, and legal holidays.

Justice, GERARD B. VAN WART, No. 340 Putnam Ave.
Clerk, WILLIAM H. ALLEN, No. 255 Vernon Ave.
Assistant Clerk, EDWARD L. STRYKER, Court House.

Stenographer, CHARLES J. DOYLE, No. 75 Vanderbilt Ave.
Attendants, SAMUEL A. ACKERMAN, No. 510 Monroe St.
J. NELSON MAGEE, No. 2038 59th St.
Janitor, JOHN S. MATSON, No. 1166 Gates Ave.
Marshal, JOHN MURRAY, No. 501 Gates Ave.
No telephone.

THIRD JUDICIAL DISTRICT.

Court held at 6 Lee Ave.
Trial days, every day except Saturday, Sunday, and legal holidays.

Justice, WILLIAM J. LYNCH, No. 247 Leonard St.
Clerk, JOHN W. CARPENTER, No. 199 Kent St.
Assistant Clerk, ARTHUR J. HIGGINS, No. 43 Marcy Ave.
Stenographer, JOHN W. RICHARDS, No. 15 Halsey St.
Interpreter, EMIL KLEBAUR, No. 829 Manhattan Ave.
Attendants, EDWARD S. WILSON, No. 20 Putnam Ave.
WALTER P. CASEY, No. 97 Russell St.
PATRICK COURTNEY, No. 1731 Fulton St.
No telephone.

FOURTH JUDICIAL DISTRICT.

Court held at 14 Howard Ave.
Trial days, every day except Saturday, Sunday, and legal holidays.

Justice, THOMAS H. WILLIAMS, No. 555 Decatur St.
Clerk, GUSTAVE J. WIEDERHOLD, No. 676 Madison St.
Assistant Clerk, RICHARD M. BENNETT, No. 869 Jefferson Ave.
Stenographer, JOHN J. REILLY, No. 139 Miller Ave.
Interpreter, HYMAN RAYFIEL, No. 1701 Pitkin Ave.
Attendants, WILLIAM MCKEE, No. 454 Lorimer St.
ROBERT HILL, No. 935 Jefferson Ave.
LOUIS ULM, No. 893 Hancock St.
Janitor, PETER AMMAN.
Marshals, ALBERT H. BLENDERMAN, No. 907 Jefferson Ave.
DAVID GOLDBERG, corner Pitkin and Stone Aves.
CHARLES HART, corner Melrose St. and Broadway.
No telephone.

FIFTH JUDICIAL DISTRICT.

Court held at northwest corner 53d St. and 3d Ave.
Trial days, Mondays, Tuesdays, and Thursdays.

Justice, CORNELIUS FURGUESON, Bath and 22d Ave.
Clerk, JEREMIAH J. O'LEARY, No. 445 58th St.
Assistant Clerk, EUGENE A. CURRAN, No. 184 Clarkson St.
Stenographer, JOSEPH N. B. RAWLE, No. 552 15th St.
Attendants, JOHN F. DWYER, Kimball Road.
PETER C. MOORE, No. 1917 Benson Ave.
CORNELIUS SNEDEKER, Bay 43d St. and Cropsey Ave.
Marshals, MICHAEL J. DUFFY.
ALONZO F. GLOVER.
Telephone, 407 Bay Ridge.

BOROUGH OF QUEENS.

FIRST JUDICIAL DISTRICT.

Court held at 46 Jackson Ave., Long Island City.
Trial days, Monday, Wednesday, and Friday.

Justice, THOMAS C. KADIEN, No. 147 12th St.
Clerk, THOMAS F. KENNEDY, No. 535 2d Ave.
Assistant Clerk, EUGENE DENNEN, No. 149 12th St.
Stenographer, JOHN J. SULLIVAN, No. 60 Hoyt Ave.
Attendants, HENRY A. SMITH, No. 396 Ditmar Ave.
THOMAS WHITE, No. 120 Broadway.
Janitor, JAMES O'ROURKE, Whitestone, L. I.
Marshal, CONRAD DIESTEL, No. 16 Pierson St.
No telephone.

SECOND JUDICIAL DISTRICT.

Court held at Court Room, corner Broadway and Court St., Elmhurst.
Trial days, Tuesdays and Thursdays.

Justice, WILLIAM RASQUIN, JR., No. 307 Lincoln St., Flushing.
Clerk, HENRY WALTER, JR., No. 21 Lutter Ave., Middle Village.
Stenographer, JAMES B. SNEDEKER, Lamont Ave., Elmhurst.
Attendants, FREDERICK W. BILLING, Maiden Lane, Maspeth.
PHILIP PETERS, Columbia Ave., Maspeth.
Janitor, WILLIAM RIGNEY, No. 748 9th Ave., Long Island City.
Marshals, AUGUST C. BRUST and FRANK RYAN, Court House.
Telephone, 87 Newtown.

THIRD JUDICIAL DISTRICT.

Court held at Town Hall, Jamaica.
Trial days, Monday, Wednesday, and Friday.

Justice, JAMES F. McLAUGHLIN, Jamaica.
Clerk, GEORGE W. DAMON, Jamaica.
Stenographer, JOHN L. GWYDIR, Jamaica.
Attendants, THOMAS FOX, Jamaica.
JOSEPH KESTLER, Woodhaven.
Marshals, WILLIAM N. GEORGE, Richmond Hill.
THOMAS J. HOBBY, Far Rockaway.
Telephone, 189 Jamaica.

BOROUGH OF RICHMOND.

FIRST JUDICIAL DISTRICT.

Court held at Village Hall, Lafayette Ave., New Brighton, Staten Island.
Trial days, every day except Sundays and holidays.

Justice, THOMAS C. BROWN.
Clerk, ANNING S. PRALL.
Assistant Clerk, THOMAS E. CREMINS.
Stenographer, JAMES DRURY.
Attendants, EDWARD FINNERTY.
FRANK LANGFORD.
Janitor, PATRICK J. MALOY.
Marshal, WILLIAM DE WOLF.
Telephone, 503 Tompkinsville.

SECOND JUDICIAL DISTRICT.

Court held at Village Hall, Stapleton, Staten Island.
Trial days, every day except Sundays and holidays.

Justice, GEORGE W. STAKE, No. 150 St. Paul's Ave., Stapleton.
Clerk, PETER TIERNAN, No. 36 Hannah St., Tompkinsville.
Assistant Clerk, WM. J. BROWNE, Bay St., Stapleton.
Stenographer, JOHN G. FARRELL, Cary Ave., West New Brighton.
Attendants, CHARLES WARNECKE, No. 20 Prospect St., Stapleton.
FRED'K H. FERGER, No. 38 Dongan St., West New Brighton.
Marshal, EDWARD PETERSON, Fulton St., Stapleton.
Telephone, 313 Tompkinsville.

THE
GREATER NEW YORK CHARTER

ENACTED IN 1897 AS AMENDED BY

Laws 1903, 1904, and 1905, with Notes of the Decisions by the Courts Affecting the Same.

Charter, § 1352, Justices.

This section, containing four subdivisions, was amended by *Laws* 1905, *chap.* 758, by adding at the end of subdivision 4 as follows:

At the general election to be held in the year nineteen hundred and five, two additional justices shall be elected, one in the sixth district and one in the seventh district of the borough of Brooklyn. Their terms shall commence on the first day of January, nineteen hundred and six.

Notes to Charter section 1353.

Qualifications, etc., of justices; must be resident and elector of district. — Under section 1353 of the amended Greater New York charter (Laws of 1901, chap. 466), which provides that a justice of the Municipal Court of the city of New York shall be "a resident and elector" of the district for which he shall be elected or appointed, and under the provision of the Public Officers Law (Laws of 1892, chap. 681), which provides that every office shall become "vacant" upon the incumbent's ceasing to be an "inhabitant" of the political division of which he is required to be a "resident" when elected or appointed, the action of a justice of the Municipal Court of the city of New York in the borough of Manhattan, second district, in removing from said district after his election and becoming an inhabitant of White Plains, Westchester county, N. Y., furnishes sufficient ground for the removal of said justice by the Appellate Division in proceedings instituted under section 1383 of the Greater New York charter, even though the justice

in question, when he removed to White Plains, did not intend to give up his residence in the district for which he had been elected or to forfeit his office.

The term "inhabitant," as used in the provision of the Public Officers Law, before mentioned, has reference to the officer's abode or domicile as distinguished from his legal residence. *Quære*, whether, under such circumstances, the justice in question could be removed from his office in an action of *quo warranto*. *Matter of Bolte*, 97 App. Div. 551.

Salary.

CHARTER, § 1355. The salary of each of said justices, except those appointed or elected from the boroughs of Queens and Richmond, shall be six thousand dollars a year, to be paid in equal monthly instalments by the proper officers of said city, and the salary of each of said justices appointed or elected for the boroughs of Queens and Richmond shall be five thousand dollars a year, to be paid in the same manner, provided, however, that whenever a justice elected or appointed for the borough of Queens or the borough of Richmond shall hold court in either of the boroughs of Manhattan, Brooklyn or the Bronx, pursuant to designation made by the president of the board of justices of said court as provided by law, such justice shall receive in addition to such salary the sum of ten dollars for each day on which he shall so hold court, to be paid on the certificate of such president. (*As amended by Laws* 1905, *chap.* 622; *became a law May* 26, 1905.)

Borough of Manhattan.

CHARTER, § 1360. In the borough of Manhattan there shall be thirteen districts, as follows:

1. The first district embraces the third, fifth and eighth wards of said borough of Manhattan, and all

that part of the first ward lying west of Broadway and Whitehall street, including Nuttin or Governor's island, Bedloe's island, Bucking or Ellis island and the Oyster islands.

2. The second embraces the second, fourth, sixth and fourteenth wards, and all that portion of the first ward lying south and east of Broadway and Whitehall street.

3. The third district embraces the ninth and fifteenth wards.

4. The fourth district embraces the tenth and seventeenth wards.

5. The fifth district embraces the eleventh ward and all that portion of the thirteenth ward which lies east of the center line of Norfolk street and north of the center line of Grand street and west of the center line of Pitt street and north of the center line of Delancey street.

6. The sixth district embraces the eighteenth and twenty-first wards.

7. The seventh district embraces the nineteenth ward.

8. The eighth district embraces the sixteenth and twentieth wards.

9. The ninth district embraces the twelfth ward, except that portion thereof which lies west of the center line of Lenox or Sixth avenue and of the Harlem river north of the terminus of Lenox avenue.

10. The tenth district embraces that portion of the twenty-second ward south of Seventieth street.

11. The twelfth* district embraces that portion of the twenty-second ward north of Seventieth street and that

*So in original.

portion of the twelfth ward which lies north of the center line of Eighty-sixth street and west of the center line of Seventh avenue and south of the center line of One Hundred and Twentieth street between Seventh avenue and Broadway and south of the center line of One Hundred and Nineteenth street between Broadway and the North or Hudson river.

12. The eleventh* district embraces that portion of the twelfth ward which lies north of the center line of West One Hundred and Tenth street between Lenox avenue and Seventh avenue north of the center line of One Hundred and Twentieth street between Seventh avenue and Broadway, and north of the center line of One Hundred and Nineteenth street between Broadway and the North or Hudson river, and west of the center line of Lenox or Sixth avenue and of the Harlem river north of the terminus of Lenox or Sixth avenue.

13. The thirteenth district embraces the seventh ward and all that portion of the thirteenth ward which lies east of the center line of Norfolk street and south of the center line of Grand street and east of the center line of Pitt street and south of the center line of Delancey street.

§ 2. There shall be elected at the general election to be held on the first Tuesday after the first Monday of November, nineteen hundred and three, justices to hold court in the said twelfth and thirteenth districts. Such justices shall enter upon the performance of their duties on the first day of January succeeding their

* So in original.

election, and their term of office shall be for ten years. The mayor shall appoint a suitable person resident in the district as justice of the court of the twelfth and thirteenth districts respectively to serve until the first day of January, nineteen hundred and four. The board of estimate and apportionment may meet at any time to provide for the immediate expenses of the municipal courts of the said twelfth and thirteenth districts, including the payment of salaries. The commissioners of the sinking fund shall secure by renting, purchase or by the purchase of a plat* of ground and erecting a building thereon, suitable rooms for the use of the said courts, and the commissioner of public works shall provide suitable furniture, books, blanks, stationery and other articles necessary for the use of the said courts. The persons appointed as justices of the said courts may make temporary appointments of clerk and assistant clerk for terms not exceeding their own. The justices, stenographers, clerks, assistant clerks, attendants and interpreters heretofore elected or appointed for the fifth and tenth and eleventh districts as constituted at the time of the passage of this act are continued in office for the fifth and tenth and eleventh districts respectively as constituted by this act.

§ 3. Nothing in this act contained shall affect in anywise any action pending in any of said courts before this act shall take effect. All acts and parts of acts now in force and not inconsistent with this act which are applicable to the municipal courts of the city of New

*So in original.

York shall be applicable to the court of the twelfth and thirteenth districts.

§ 4. The comptroller shall, without the concurrence or approval of any other officer, board or department, provide the fund necessary for the payment of the salaries of the justices, clerks, assistant clerks, attendants, stenographers and interpreters of the twelfth and thirteenth district courts as constituted by this act, for the year nineteen hundred and three, by the issue of special revenue bonds as may be required to pay said salaries.

§ 5. This act, so far as it authorizes the appointment by the mayor of justices of the twelfth and thirteenth district courts shall take effect immediately; but in all other respects shall not take effect until twenty days after it shall become a law. (*As amended by Laws* 1903, *chap.* 645, *in effect May* 22, 1903.)

Notes to Charter section 1360, "Borough of Manhattan."

The foregoing section will remain the law until January 1, 1906, when, in pursuance of the act of the Legislature (Laws 1905, chap. 730), changes are made in the boundaries of the seventh, ninth, tenth, and twelfth districts, and a new district, the fourteenth district, is created. Laws 1905, chapter 730, is as follows:

Section 1. Section thirteen hundred and sixty of the Greater New York charter as enacted by chapter four hundred and sixty-six of the laws of nineteen hundred and one is hereby amended so as to read as follows:

CHARTER, § 1360. In the borough of Manhattan there shall be fourteen districts as follows:

1. The first district embraces the third, fifth and eighth wards of said borough of Manhattan, and all

that part of the first ward lying west of Broadway and Whitehall street, including Nuttin or Governor's island, Bedloe's island, Bucking or Ellis island, and the Oyster islands.

2. The second* embraces the second, fourth, sixth and fourteenth wards, and all that portion of the first ward lying south and east of Broadway and Whitehall street.

3. The third district embraces the ninth and fifteenth wards.

4. The fourth district embraces the tenth and seventeenth wards.

5. The fifth district embraces the eleventh ward and all that portion of the thirteenth ward which lies east of the center line of Norfolk street and north of the center line of Grand street and west of the center line of Pitt street and north of the center line of Delancey street.

6. The sixth district embraces the eighteenth and twenty-first wards.

7. The seventh district embraces the nineteenth ward except that portion embraced in the fourteenth district.

8. The eighth district embraces the sixteenth and twentieth wards.

9. The ninth district embraces the twelfth ward, except that portion thereof which lies west of the center line of Lenox or Sixth avenue and of the Harlem river north of the terminus of Lenox avenue, and that portion embraced in the fourteenth district.

*So in original. The word "district" is omitted.

10. The tenth district embraces that portion of the twenty-second ward south of Seventieth street, except that portion embraced in the fourteenth district.

11. The twelfth* district embraces that portion of the twenty-second ward north of Seventieth street and that portion of the twelfth ward which lies north of the center line of Eighty-sixth street and west of the center line of Seventh avenue and south of the center line of One hundred and twentieth street between Seventh avenue and Broadway and south of the center line of One hundred and nineteenth street between Broadway and the North or Hudson river, except that portion embraced in the fourteenth district.

12. The eleventh* district embraces that portion of the twelfth ward which lies north of the center line of West One hundred and tenth street between Lenox avenue and Seventh avenue north of the center line of One hundred and twentieth street between Seventh avenue and Broadway, and north of the center line of One hundred and nineteenth street between Broadway and the North or Hudson river, and west of the center line of Lenox or Sixth avenue and of the Harlem river north of the terminus of Lenox or Sixth avenue.

13. The thirteenth district embraces the seventh ward and all that portion of the thirteenth ward which lies east of the center line of Norfolk street and south of the center line of Grand street and east of the

*So in original.

center line of Pitt street and south of the center line of Delancey street.

14. The fourteenth district embraces that portion of the borough of Manhattan bounded as follows: Beginning at West Fortieth street and Eighth avenue, north on Eighth avenue to West Fifty-third street, east on West Fifty-third street to Seventh avenue, north on Seventh avenue to West Fifty-ninth street, west on West Fifty-ninth street to Eighth avenue, north on Eighth avenue and Central Park West to the Transverse road at Central Park West and West Ninety-seventh street, east on the Transverse road to Fifth avenue and East Ninety-seventh street, south on Fifth avenue to East Ninety-sixth street, east on Ninety-sixth street to Lexington avenue, south on Lexington avenue to East Sixty-fifth street, west on East Sixty-fifth street to Park avenue, south on Park avenue to East Sixty-first street, east on East Sixty-first street to Lexington avenue, south on Lexington avenue to East Fortieth street, west on East and West Fortieth street to the point of beginning at West Fortieth street and Eighth avenue.

§ 2. There shall be elected at the general election to be held on the first Tuesday after the first Monday of November, nineteen hundred and five, a justice for the said fourteenth district by the electors thereof. Such justice shall enter upon the performance of his duties on the first day of January succeeding his election, and his term of office shall be for ten years. The board of estimate and apportionment may meet at any time to provide for the immediate expenses of

the municipal court of the said fourteenth district, including the payment of salaries. The commissioner of the sinking fund shall secure, by renting, or by the purchase of a plot of ground, and erecting a building thereon, suitable rooms for the use of the said court, and the commissioner of public works shall provide suitable furniture, books, blanks, stationery, and other articles necessary for the use of said court. The justices, stenographers, clerks, assistant clerks, attendants, interpreters heretofore elected or appointed for the seventh, ninth, tenth and twelfth districts as constituted at the time of the passage of this act, are to continue in office for the seventh, ninth, tenth and twelfth districts, respectively, as constituted by this act.

§ 3. The comptroller shall, without the concurrence or approval of any other officer, board or department, provide the fund necessary for the securing of suitable rooms for the use of the said court in the fourteenth district and providing it with suitable furniture, books, blanks, stationery and other articles necessary for the use of the said court by the issue of special revenue bonds as may be required to pay said expenses.

§ 4. This act, so far as it requires the securing of suitable rooms, furniture, books, blanks, stationery and other articles necessary for the use of the said court in the fourteenth district; so far as it authorizes the payment of the expenses so incurred; and so far as it provides for elections to be held during the year nineteen hundred and five, shall take effect immediately,

but in all other respects shall not take effect until January first, nineteen hundred and six. (*As amended, Laws* 1905, *chap.* 730.)

Borough of Brooklyn.

CHARTER, § 1361. In the borough of Brooklyn there shall be seven districts, as follows:

1. The first district embraces the first, second, third, fourth, fifth, sixth, tenth and twelfth wards and that portion of the eleventh ward beginning at the intersection of the centre lines of Hudson and Myrtle avenues, thence along the centre line of Myrtle avenue to North Portland avenue, thence along the centre line of North Portland avenue to Flushing avenue, thence along the centre line of Flushing avenue to Navy street, thence along the centre line of Navy street to Johnson street, thence along the centre line of Johnson street to Hudson avenue, and thence along the centre line of Hudson avenue to the point of beginning.

2. The second district embraces the seventh ward and that portion of the twenty-first and twenty-third wards west of the centre line of Stuyvesant avenue and the centre line of Schenectady avenue, also that portion of the twentieth ward beginning at the intersection of the centre lines of North Portland and Myrtle avenues, thence along the centre line of Myrtle avenue to Waverly avenue, thence along the centre line of Waverly avenue to Park avenue, thence along the centre line of Park avenue to Washington avenue, thence along the centre line of Wash-

ington avenue to Flushing avenue, and thence along the centre line of Flushing avenue to North Portland avenue, and thence along the centre line of North Portland avenue to the point of beginning.

3. The third district embraces the thirteenth, fourteenth, fifteenth, sixteenth, seventeenth, eighteenth and nineteenth wards and that portion of the twenty-seventh ward lying northwest of the centre line of Starr street between the boundary line of Queens county and the centre line of Central avenue and northwest of the centre line of Suydam street between the centre lines of Central and Bushwick avenues, and northwest of the centre line of Willoughby avenue between the centre lines of Bushwick avenue and Broadway.

4. The fourth district embraces the twenty-fourth and twenty-fifth wards, that portion of the twenty-first and twenty-third wards lying east of the centre line of Stuyvesant avenue and east of the centre line of Schenectady avenue and that portion of the twenty-seventh ward lying southwest of the centre line of Starr street between the boundary line of Queens county and the centre line of Central avenue, and southeast of the centre line of Suydam street between the centre lines of Central and Bushwick avenues, and southeast of the centre line of Willoughby avenue between the centre lines of Bushwick avenue and Broadway.

5. The fifth district embraces the eighth, thirtieth and thirty-first wards and that portion of the twenty-second ward south of the centre line of Prospect avenue.

6. The sixth district embraces the ninth and twenty-ninth wards and that portion of the twenty-second ward north of the centre line of Prospect avenue, also that portion of the eleventh and twentieth wards beginning at the intersection of the centre lines of Bridge and Fulton streets, thence along the centre line of Fulton street to Flatbush avenue, thence along the centre line of Flatbush avenue to Atlantic avenue, thence along the centre line of Atlantic avenue to Washington avenue, thence along the centre line of Washington avenue to Park avenue, thence along the centre line of Park avenue to Waverly avenue, thence along the centre line of Waverly avenue to Myrtle avenue, thence along the centre line of Myrtle avenue to Hudson avenue, thence along the centre line of Hudson avenue to Johnson street, and thence along the centre line of Johnson street to Bridge street, and thence along the centre line of Bridge street to the point of beginning.

7. The seventh district embraces the twenty-sixth, twenty-eighth and thirty-second wards.

§ 3. This act shall not affect any action or proceeding in the municipal courts as presently constituted, pending before the first day of January nineteen hundred and six or affect until then any of the districts mentioned in said section thirteen hundred and sixty-one of said act before this amendment thereof or affect in any wise the justices of the districts now existing, who shall until the expiration of their respective terms be and continue as justices of said court for the districts for which they were elected,

and of the districts by this act territorially changed and altered, bearing the same number as that in and for which they were respectively elected. The commissioners of the sinking fund shall procure by renting, purchase, or by purchase of a plot of ground and erecting a building thereon, suitable rooms for the use of the courts of the sixth and seventh districts by this act created, and the commissioner of public works shall provide suitable furniture, books, blanks, stationery and other articles necessary therefor, in time for the effectual operation of said courts on the first day of January, nineteen hundred and six. The board of estimate and apportionment may meet at any time to provide for the expense of securing such suitable rooms for and furnishing and equipping said courts, and shall make provision for the payment of the salaries of the justices, clerks, assistant clerks, stenographers, interpreters and court attendants in said districts for the year nineteen hundred and six, and shall annually include in the budget such sums as may be necessary to pay such salaries, and the comptroller of the city of New York, in order to secure such rooms and equip said courts, shall, without the concurrence of any other officer, board or department provide the fund necessary therefor by the issue of special revenue bonds of said city.

§ 4. All acts and parts of acts inconsistent herewith are hereby repealed.

§ 5. This act shall take effect immediately. (*As amended by Laws* 1905, *chap.* 758.)

Notes to Charter section 1373, "Clerks and Assistant Clerks."

Clerks and assistant clerks; removal of veteran.— Section 1373 of the revised Greater New York charter (Laws 1901, chap. 466), as amended by chapter 497 of the Laws of 1902, which authorizes a justice of the Municipal Court of the city of New York to remove an attendant employed about the court, upon giving him notice of the cause of his proposed removal and an opportunity to make an explanation, is to be construed, in the case of a veteran of the Spanish-American war, in connection with and is limited by section 21 of the Civil Service Law (Laws 1899, chap. 370, as amended by Laws 1902, chap. 270), which provides that no honorably discharged soldier who served in the volunteer army of the United States during the Spanish war shall be removed from the position or employment held by him except for incompetence or misconduct shown, "after a hearing, upon due notice, upon stated charges, and with the right to such employee or appointee to a review by a writ of certiorari." *People ex rel. Reilly* v. *Hoffman*, 98 App. Div. 4.

Notes to Charter section 1383, "Removal."

Removal of justice; causes for; the office is vacated by a change of residence; inhabitant defined; remedy by quo warranto; the rules of the Municipal Court have the force of law; favoritism by the justice; assignment of a cause of action to enable suit to be brought in a particular court; what ex parte applications in actions in another court may be made to a justice; an order to exhibit writings must be made by the court; application of the practice in the Supreme Court; opening defaults.— A judicial officer may not be removed for merely making an erroneous decision or ruling, but he may be removed for willfully making a wrong decision or an erroneous ruling or for a reckless exercise of his judicial functions without regard to the right of litigants, or for manifesting friendship or favoritism toward one party or his attorney to the prejudice of another and to the destruction of his usefulness as a magistrate through the loss of public confidence in his fairness or integrity. Under section 1353 of the amended Greater New York charter (Laws of 1901, chap. 466), which provides that a justice of the Municipal Court of the city of New York shall be "a resident and elector" of the district for which he shall be elected or appointed, and under the provision of the Public Officers Law (Laws of 1892, chap. 681), which provides that every office shall become "vacant" upon the incumbent's ceasing to be an "inhabitant" of the political division of which he is required to be a "resident" when elected or appointed, the action of a justice of the Municipal Court of the city of New York in the borough of Manhattan, second district, in removing from said district after his election and becoming an inhabitant of White Plains, Westchester county, N. Y., furnishes suf-

ficient ground for the removal of said justice by the Appellate Division in proceedings instituted under section 1383 of the Greater New York charter, even though the justice in question, when he removed to White Plains, did not intend to give up his residence in the district for which he had been elected or to forfeit his office.

The term "inhabitant," as used in the provision of the Public Officers Law, before mentioned, has reference to the officer's abode or domicile as distinguished from his legal residence. *Quære*, whether, under such circumstances, the justice in question could be removed from his office in an action of *quo warranto*.

Rules enacted by the board of justices of the Municipal Court, pursuant to section 12 of the Municipal Court Act (Laws of 1902, chap. 580), have the force of law and are binding upon the individual justices.

Favoritism in the performance of judicial duties constitutes corruption. The willful abuse of judicial discretion is the most oppressive and injurious kind of official misconduct.

The fact that an assignment of a cause of action was made for the purpose of enabling an action to enforce the same to be brought in a particular district of the Municipal Court of the city of New York does not invalidate the assignment, but such practice should not be encouraged.

Rule 15 of the rules of the Municipal Court of the city of New York which provides that *ex parte* applications may be made to any justice, only authorizes applications in actions pending in one district to a justice of another district for such orders as may be granted by a justice as distinguished from the court.

The authority contained in section 165 of the Municipal Court Act, for ordering the exhibition of a writing or account declared on in an action in the Municipal Court, is conferred upon the court and not upon a justice thereof. The section does not authorize the examination of books as by a bill of discovery.

The extension of the practice in courts of record to the Municipal Court of the city of New York by section 20 of the Municipal Court Act was merely intended to regulate the matters over which the Municipal Court has jurisdiction.

Section 253 of the Municipal Court Act, authorizing the opening of defaults or omissions on such notice as the court may direct, contemplates an order by the court in which the default was taken. *Matter of Bolte*, 97 App. Div. 551.

Summons and costs in actions by city of New York, for recovery of penalties.

CHARTER, § 1384. In any and all actions brought in the name of the people of the state of New York

by the attorney general or in the name of the city of New York, or of any department, board or officer thereof, by the corporation counsel of the city of New York, as attorney for said city, or said department, board or officer thereof, to recover a penalty or penalties for the violation of any law or ordinance, the summons may be issued out of said court by the attorney general or by the corporation counsel in his own name without the same being subscribed by the clerk of the court where such action or actions are brought, and in such actions the attorney general or the corporation counsel shall not be required to pay to the clerk of the court the fees in the action, but shall account therefor to the city treasurer and shall collect the same from the defendant, when judgment is recovered; and no fees or costs shall be demanded of the people of the state of New York or the attorney general or of the said the city of New York, or any department, board or officer thereof in any such suit or proceeding. (*As amended by Laws* 1905, *chap.* 125; *became a law March* 31, 1905.)

Note to Charter section 1384.

This section is the same as section 29 of the Municipal Court Act (Laws 1905, chap. 73), which became a law March 17, 1905, with the exception of the omission of the word "department" before the word "board" in the last line.

Notes to Charter section 1427, "Marshals."

Additional personal property exempt in certain cases.— See amendment to Code Civil Procedure, section 1391, by Laws 1905, chapter 175, to be found under section 271, p. 103 of this supplement.

THE

MUNICIPAL COURT ACT OF THE CITY OF NEW YORK.

(LAWS 1902, CHAP. 280), AS AMENDED BY LAWS 1903, 1904, AND 1905, WITH NOTES OF THE DECISIONS BY THE COURTS AFFECTING THE SAME.

§ 1. **Jurisdiction.**— Except as provided in the next section the municipal court of the city of New York has jurisdiction in the following civil actions and proceedings:

1. An action to recover damages upon or for breach of contract, express or implied, other than a promise to marry, where the sum claimed does not exceed five hundred dollars, exclusive of interest and costs.

2. An action upon a bond conditioned for the payment of money where the sum claimed to be due does not exceed five hundred dollars, exclusive of interest and costs, the judgment to be rendered for the sum actually due. Where the sum secured by the bond is to be paid in installments, an action may be brought for each installment as it becomes due.

3. An action upon a surety bond or undertaking taken in any court where the amount claimed in the summons does not exceed the sum of five hundred dollars, exclusive of interest and costs.

4. An action in behalf of the people of the state or of the city of New York, brought by the direction of a commissioner of public charities or an overseer of the poor upon a bastardy or abandonment bond in a case where it is prescribed by law that such an action can be maintained.

5. An action upon the bond of a marshal of the city of New York, as prescribed in this act.

6. An action upon a judgment rendered in any court not being a court of record.

7. An action for a fine or penalty not exceeding five hundred dollars, including an action to recover a penalty given

by the charter of the city of New York or any by-law or ordinance thereof or by any statute of the state.

8. An action to recover damages for an escape from the jail liberties of any county within the city of New York, where the sum claimed does not exceed five hundred dollars and costs.

9. An action to recover one or more chattels with or without damages for the taking, withholding or detention thereof, where the value of the chattel or of all the chattels as stated in the affidavit made on the part of the plaintiff does not exceed five hundred dollars.

10. An action to foreclose a lien upon a chattel for a sum of money, in any case where such a lien exists at the commencement of the action and where the amount of the lien does not exceed five hundred dollars, exclusive of interest and costs.

11. An action to enforce a mechanic's lien on real property in which the court shall have power to render judgment for the sum due, and to declare the amount a valid lien against the interest of the defendant in the property described in the complaint, at the time of the filing of the lien, where the amount does not exceed five hundred dollars, exclusive of interest and costs, but said court cannot render judgment for the foreclosure and sale of the property.

12. A summary proceeding under title two of chapter seventeen of the code of civil procedure to recover possession of real property which, or a portion of which, is situated within the district wherein the application for such recovery is made. Such proceeding may be tried with or without a jury, which may be demanded by any party thereto. The court in either case has power upon application, to allow the petition or answer to be amended at any time, if substantial justice will be promoted thereby and the rights of the parties have not been impaired by reason of the defective pleading, to direct or set aside a verdict, and to grant or deny a motion for a new trial, and an appeal may be taken therefrom.

13. An action for damages for fraud or deceit where the damages claimed do not exceed five hundred dollars.

14. An action to recover damages for a personal injury, or for loss of services or for medical or other necessary expenses occasioned thereby, or an injury to property, where the sum claimed does not exceed five hundred dollars, and costs, excepting however, actions to recover damages for an assault, battery, malicious prosecution, false imprisonment, libel, slander, criminal conversation, seduction, or loss of society of husband or wife.

15. To issue or vacate a requisition to replevy, a warrant of attachment, or an order of arrest; or grant or vacate a stay of execution, or of proceedings, within the limitations provided in this act. But such stay shall not exceed five days.

16. To render judgment in an action or make a final order in summary proceedings upon confession or upon the consent of both parties.

17. Other civil actions or proceedings of which district courts in the city of New York, or justices of the peace had jurisdiction on the thirty-first day of December, eighteen hundred and ninety-seven, except such as shall be expressly excluded by this act.

18. The jurisdiction extends to actions against the city of New York, a domestic corporation, or a foreign corporation having an office in the city of New York, an administrator or executor as such, where the amount claimed does not exceed five hundred dollars, exclusive of interest and costs.

19. In an action or a summary proceeding, to direct or set aside a verdict, vacate, amend or modify a judgment or final order, rendered, or made on consent, confession, inquest or trial, grant a new trial, open a default, or in a proper case grant a new trial on the ground of fraud or newly discovered evidence. (*As amended by Laws* 1905, *chap.* 513, *and became a law May* 17, 1905.)

NOTE.

The amendments add to subdivisions 1, 2, 3, 10, 11, and 18 the words "exclusive of interest and costs," and to subdivisions 8 and 14 the words "and costs."

Notes to section 1, "Jurisdiction."

Actions to recover less than $250 must be brought in this court, and actions to recover less than $500 must be brought in the City Court of the city of New York or the County Court of Kings county.— Section 1. Section three thousand two hundred and twenty-eight of the Code of Civil Procedure is hereby amended by adding thereto a new subdivision to be numbered five and to read as follows:

5. In all actions hereafter brought in the Supreme Court, triable in the county of New York or the county of Kings, which could have been brought, except for the amount claimed therein, in the City Court of the City of New York or the County Court of Kings county, and in which the defendant shall have been personally served with process within the counties of New York or Kings, the plaintiff shall recover no costs or disbursements *unless he shall recover five hundred dollars or more;* and in all actions hereafter brought in the City Court of the City of New York or the County Court of Kings county, which could have been brought, except for the amount claimed therein, *in the Municipal Court of the city of New York,* and in which the defendant shall have been personally served with process within the city of New York, the plaintiff shall recover no costs or disbursements *unless he shall recover two hundred and fifty dollars or more.* The fact that in any action a plaintiff is not entitled to costs under the provisions of this subdivision shall not entitle the defendant to costs under the next following section.

§ 2. This act shall take effect September one, nineteen hundred and four. (*As amended by Laws* 1904, *chap.* 557.)

Amended rules; City Court of the city of New York; January 5, 1905; Rule 4.— No action brought for the recovery of less than $250 which could have been brought in the Municipal Court of the city of New York will be advanced to the special calendar.

Substituted service; proof thereof requisite to jurisdiction.— Proof of due substituted service and a compliance with section 34 of the Municipal Court Act are essential to jurisdiction. A mere memorandum on the summons of payment of fees is not such proof of substituted service. Objection to jurisdiction on such ground may be raised at any time. *Skinner* v. *Jordan,* 46 Misc. Rep. 92.

Waiver of jurisdiction.— The fact, that after the denial of the motion to vacate the attachment, the action was dismissed because of the failure of either party to appear on the day set for its trial, and that the defendant subsequently consented that the case be restored to the calendar and allowed judgment to be taken against him by default, does not operate as a waiver of the defendant's right to contest the jurisdiction of the court. *Delaney* v. *Bouse,* 91 App. Div. 437.

Notes to section 1, subdivision 1.

Author's contract for royalties; effect of prior contract for the publication, not carried out.— Where a publisher contracts to publish a novel "in book form" it is no defense to an action by the author for the royalties that he, with the knowledge of the defendant, had previously contracted with another publisher for the publication of the same book, the conditions being that the book be published within a given time (which was not done), and which failure gave to the author a reversion of the rights upon the payment of a given sum.

Nor is it a defense that the author has not yet paid such given sum to the other publisher, because, under the contract, the defendant purchased the plaintiff's permission to publish, not the right. *Barry* v. *Smart Set Publishing Co.*, 45 Misc. Rep. 402.

Bankruptcy; guarantor for rent held liable.— In an action to recover rent upon a guarantee of defendant to pay the same, the adjudication of the lessee a bankrupt does not terminate the lease and the defendant is liable for the rent. *Witthaus* v. *Zimmermann*, N. Y. Law Journal, January 20, 1903, JOSEPH, J., sitting in the seventh district, Borough of Manhattan.

Brokers' commissions.— A broker employed to procure a loan upon property, who induces a person financially able, and otherwise competent to make the loan, to execute a written acceptance of the application for the loan is *not* entitled to a commission, if such person subsequently refuses to make the loan. *Ashfield* v. *Case*, 93 App. Div. 452.

For notes and cases on brokers' commissions, see 25 Abb. N. C. 206, 209, etc.

Authority to sell; written; constitutionality; Penal Code, section 640d, requiring an agent to obtain written authority to sell real estate is unconstitutional; what the court may consider in determining whether a statute is reasonable; limitations on the legislative power to regulate business.— Section 640d, added to the Penal Code by chapter 128 of the Laws of 1901, which provides that "in cities of the first class and the second class any person who shall offer for sale any real property without the written authority of the owner of such property or of his attorney in fact, appointed in writing, or of a person who has made a written contract for the purchase of such property with the owner thereof, shall be guilty of a misdemeanor," is unconstitutional in that it is an unreasonable interference with the liberty secured to the person affected thereby by both the New York State and Federal Constitutions.

In determining the reasonableness of a statute the court is at liberty to consider the established usages, customs, and traditions of the people and to have in view the promotion of their comfort and the preservation of public peace and good order. To justify the State in regulating a business or occupation in behalf of the public it must appear, first,

that the interests of the public, generally, as distinguished from those of a particular class, require such interference, and, second, that the means are reasonably necessary for the accomplishment of the purpose and are not unduly oppressive upon individuals. The Legislature cannot, under the guise of protecting the public interests, arbitrarily interfere with private business or impose unusual or unnecessary restrictions upon lawful occupations. *Grossman* v. *Caminez*, 79 App. Div. 15.

Section 640d of the Penal Code, making it a misdemeanor to sell or offer to sell in cities of the first and second class real estate without the written authority of the owner is constitutional.—*Semble*, that section 640*d of the Penal Code*, added by *chapter* 128 *of the Laws of* 1901, which provides that in cities of the first and second class any person who shall offer real property for sale without the written authority of the owner is guilty of a misdemeanor, is constitutional and a reasonable exercise of the police power. (See *contra*, *Grossman* v. *Caminez*, 79 App. Div. 15.)

Criminal laws are not necessarily unconstitutional because they bear unequally upon persons in different parts of the State. *Whiteley* v. *Terry*, 83 App. Div. 197.

Where the attorney in fact for the owner of a parcel of real property in a city of the first class employs a broker to effect an exchange of such real estate and executes and delivers to such broker, with the intention of authorizing him to negotiate the transfer, the following instrument: "They will take 86st subject to 1st and 2nd mortgages. We to take 26th ward lots subject to taxes and assessments not to exceed $6,500.00. William Dempsey," such instrument is a substantial compliance with section 640d of the Penal Code, which provides that in cities of the first and second class, "any person who shall offer for sale any real property without the written authority of the owner of such property, or of his attorney in fact, appointed in writing," etc., shall be guilty of a misdemeanor. Assuming the statute in question to be constitutional, the failure of a broker, employed to effect the sale or exchange of real estate in the city of New York, to procure the written authority required by the statute, will not, where the contract of sale or exchange has been executed, prevent the broker from recovering his commissions. *Semble*, however, that the statute is unconstitutional. Where a contract, not unlawful in itself, has been executed and the parties have enjoyed the benefits of the contract, the mere fact that one of the parties has violated a penal statute in the approach to the contract will not prevent the court from enforcing payment. *Cody* v. *Dempsey*, 86 App. Div. 336.

Construction of section 640d Penal Code.—A broker is no guarantor of the validity of the title to real property offered by him for sale at his own risk of fine and imprisonment. A broker who offers property for sale after having in good faith obtained the written authorization of the ostensible owner thereof has complied with the spirit of the

law, and the letter thereof must yield to such a reasonable and sensible construction. If there are other parties also owners whose authorization was not obtained, that does not relieve the defendant, who as ostensible owner employed the broker, from liability to pay commission, nor is there any question of public policy involved preventing him enforcing his contract with defendant. *Phelps* v. *Becker*, N. Y. Law Journal, October 9, 1903, Tierney, J., sitting in the second district, Borough of the Bronx.

Sales for future delivery; proof necessary to recover where such sales alleged to be mere wagers; account stated, when not proven.— In an action by the assignee of a broker to recover commissions and losses on a sale of cotton for future delivery the answer denied that the sale was *bona fide* and alleged it to be in violation of the law against gambling and a mere wager on the price of cotton. *Held*, in order to recover, the plaintiff must give competent evidence of a genuine sale and loss. Mere memoranda of telephonic communications purporting to carry out defendant's order are hearsay and are insufficient to establish such sale and on such evidence it is error to refuse to dismiss the complaint. The defendant, having denied his liability, in a personal interview with the plaintiff's assignor, made no reply to a statement of account thereafter sent him. *Held*, such silence does not bind the defendant on an account stated. *Jacobs* v. *Cohn*, 46 Misc. Rep. 115.

Building; damages for the breach of a contract to remove, within a specified time; $500 and interest and costs are demanded; bill of particulars for $507.33.— An action brought in this court to recover damages resulting from the breach by the defendant of a contract to remove a building within a specified time was begun by the service of the summons alone, which summons stated that in the event of the defendant's default the plaintiffs would "take judgment against you for the sum of $500 00/100, * * * with interest from the ..... day of ....., 190.., together with the costs of this action."

The plaintiffs subsequently served a bill of particulars in which they alleged that the damages resulting from the breach of contract amounted to $507.33. The action was tried and resulted in a judgment for the plaintiffs of $294.37, which included damages and costs.

Held, that it was improper to reverse the judgment and dismiss the complaint on the ground that the demand of the plaintiffs was for a greater sum than $500 and that consequently the Municipal Court had no jurisdiction of the action; that the demand for costs in excess of the $500 did not oust the court of jurisdiction, as such costs were not a part of the plaintiffs' demand but a mere incident to the recovery; that the demand for interest did not oust the court of jurisdiction, for the reason that the plaintiffs were not entitled to recover interest as such, their damages being unliquidated; that the statement in the bill of particulars that the damages amounted to $507.33 did not deprive the court of jurisdiction, as the plaintiffs were at liberty, under section

250 of the Municipal Court Act, to remit the excess over $500. *Hamburger* v. *Hellman*, 103 App. Div. 263.

Carrier; measure of damages against.— A lawyer, delayed by a railroad wreck and who has not informed the carrier of special circumstances which make it necessary for him to reach his destination on schedule time, can recover of the carrier merely compensatory damages — the value of his time, during the period of delay, based upon the average of what he had earned for at least a year preceding the time of the occurrence. *Cooley* v. *Pennsylvania R. R. Co.*, 40 Misc. Rep. 239.

Chattel mortgages; conversion; when demand necessary; section 139 does not prevent chattel mortgagees from taking possession under mortgage.— In an action for conversion against a chattel mortgagee, alleged to have replevied the property in violation of section 139 of the Municipal Court Act which provides that no action can be maintained in said court on a chattel mortgage except to foreclose the same, *held*, where the judgment-roll in the alleged action to replevin returned on appeal was only marked at trial for identification and was not put in evidence and is defective in proof of service of summons and in that no writ of replevin is attached, etc., the appellate court is bound by the record. There is nothing to show that the property was taken on replevin.

Held, further, that as the chattel mortgage gave to the mortgagee a right to enter, take away, and sell the goods, etc., there is nothing in such record to show that defendant's possession was not rightfully obtained under the mortgage.

The aforesaid limitation of section 139 of the Municipal Court Act does not preclude a chattel mortgagee from taking the possession according to the terms of the mortgage.

If the taking of goods is lawful it does not become unlawful without a subsequent demand for compliance with the terms of the mortgage, or a demand with tender of amount due. *Shelton* v. *Holzwasser*, 46 Misc. Rep. 76.

Conversion, based on a breach of a written contract for the conditional sale of personal property, will not lie.— Section 139 of the act relating to the Municipal Court of the city of New York (Laws of 1902, chap. 580) which provides, "No action shall be maintained in this court, which arises on a written contract of conditional sale of personal property, where title is not to vest in the person hiring until payment of a certain sum; or a chattel mortgage made to secure the purchase price of chattels; except, an action to foreclose the lien, as provided in this article," limits the jurisdiction of the court with respect to actions for a breach of a written contract for the conditional sale of personal property, and a party having such a cause of action cannot maintain an action in that court for the conversion of such property on the ground that the cause of action is for "an injury to property" within

the meaning of subdivision 14 of section 1 of the act. *Samodwitz* v. *Karpf*, 80 App. Div. 496.

Damages; breach of contract.— Where the evidence in an action for breach of contract to dye certain ribbons does not show that they were rendered absolutely worthless, but only of no value to plaintiffs, a judgment for damages for the full amount of their original value is excessive. *Emmerich* v. *Chegnay*, 46 Misc. Rep. 456.

Employment and wages; damages.— An action to recover damages for a breach of a contract of employment, because of the employee's wrongful discharge before the expiration of the term of employment, is entirely distinct from an action brought by the employee to recover wages.

In the first-mentioned form of action it is not necessary for the employee to aver and show affirmatively that he unsuccessfully sought other employment or that he stood in readiness to perform after the contract had been terminated, but the burden rests upon the employer to show that other employment might have been found or that it had been offered and declined. The fact that the complaint in such an action demands money as due rather than by way of damages does not necessarily render it defective.

When a complaint, although drawn by the pleader on the theory of an action for wages, contains sufficient allegations to warrant the court in construing it as one to recover damages for breach of the contract of employment, considered. *Allen* v. *Glen Creamery* Co., 101 App. Div. 306.

Foreign corporation, having an office in said city, as surety upon a city marshal's bond.— The jurisdiction of this court to render judgment against a foreign corporation, having an office in said city and being surety on the bond of a city marshal, is to be determined by the Municipal Court Act (Laws 1902, chap. 580, § 1, subds. 5 and 18) and under these subdivisions when read together there is no jurisdiction where the plaintiff claims more than $500. Section 296 of said act authorizing a justice of the Supreme Court to order prosecution in the said Municipal Court of a marshal's bond — without limitation as to its amount — cannot aid the plaintiff and is to be condemned as an attempt to give such a justice power to confer upon the said Municipal Court jurisdiction in such a case beyond $500. *Frieland* v. *Union Surety Co.*, 43 Misc. Rep. 38.

Husband and wife; medical services.— In an action against a husband for medical services rendered to his wife, who is living apart from him, it is essential to show that the separation was due to the husband's fault, and the burden of such proof is on the plaintiff. Exclusion of evidence offered by the defendant to show that there was no cause for his wife refusing to live with him is error. *Wolf* v. *Schulman*, 45 Misc. Rep. 418.

Support of wife; when the wife is liable for necessaries; evidence insufficient to establish her liability; testimony given by an adverse party; the party calling his adversary as a witness may controvert his testimony.— The common-law duty of a husband to support his family has not been changed by the legislation respecting married women, and the liability for necessaries furnished to the family of a married man rests presumptively and primarily upon the husband, even though the contract therefor is made by the wife. *Semble*, that the wife may, however, by express agreement, render herself personally liable for necessaries furnished to her husband and family. What evidence is insufficient to sustain a finding of such an express agreement on the part of a wife, considered. A party who calls his adversary as a witness is not precluded, under the rule which prohibits a party from impeaching his own witness, from showing by other witnesses the existence of a different state of facts from that testified to by his adversary. *Ruhl* v. *Heintze*, 97 App. Div. 442.

Married woman's right of action for wages, et cetera.—A married woman shall have a cause of action in her own sole and separate right for all wages, salary, profits, compensation or other remuneration for which she may render work, labor or services, or which may be derived from any trade, business or occupation carried on by her, and her husband shall have no right of action therefor unless she or he with her knowledge and consent has otherwise expressly agreed with the person obligated to pay such wages, salary, profits, compensation or other remuneration. In any action or proceeding in which a married woman or her husband shall seek to recover wages, salary, profits, compensation or other remuneration for which such married woman has rendered work, labor, or services or which was derived from any trade, business or occupation carried on by her or in which the loss of such wages, salary, profits, compensation or other remuneration shall be an item of damage claimed by a married woman or her husband, the presumption of law in all such cases shall be that such married woman is alone entitled thereto, unless the contrary expressly appears.

§ 2. The foregoing section shall not affect any right, cause of action or defense existing before the date when this act shall take effect. (*Laws* 1905, *chap.* 495, *amending section* 30 *of chap.* 272 *of the Laws of* 1896, *entitled "An act in relation to the domestic relations law, constituting chap.* 48 *of the General Laws," as added by chap.* 289 *of the Laws of* 1892.)

When earnings belong to wife.— Under the acts relating to the rights of married women (*L.* 1860, *chap.* 90, § 2; *L.* 1884, *chap.* 381, § 1), the earnings of the wife from services rendered to a third party, distinct from the common-law duties she owes her husband in the marital relation, in this case as a nurse or attendant, belong to the

wife, and she, and not he, is entitled to recover therefor. *Stevens* v. *Cunningham*, 181 N. Y. 454, rev'g 75 App. Div. 125.

Evidence as to election to labor on her own account.— The fact that a married woman enters upon an independent employment which she pursues openly for six years, without protest or interference from her husband, shows a sufficient election on her part to labor on her own account and thereby entitled herself to her earnings. (*Ibid.*)

Presumption as to earnings.— *Section* 30 *of chapter* 289 *of the Laws of* 1902, an act to amend the Domestic Relations Law in relation to a married woman's right of action for wages, etc., was not passed to overcome any common-law presumption that, notwithstanding the passage of the Married Woman's Acts, the services of the wife belonged to her husband, but to make clear the principle which is to be found in many of the decisions construing these statutes in the interest of married women and providing a presumption in their favor. (*Ibid.*)

Infancy as defense in action for conversion.— Infancy is a defense to an action for conversion because of failure to return a watch as promised. An infant cannot be held on a mere contractual promise by merely changing the form of action to one *ex delicto*, in a case where no actual appropriation of the property is shown. *Stone* v. *Rabinowitz*, 45 Misc. Rep. 405.

Master and servant; what sickness of the servant will justify the master in dismissing him.— An employee engaged to render personal services for a specified period, who is, by reason of sickness, disabled from completing his period of service, may recover the value of such services as he has actually rendered. Sickness under such circumstances is to be deemed the act of God. While, under such a contract, the employer is not bound to wait an unreasonable length of time for the restoration of the servant's health, the illness which will justify him in dismissing the servant must be something more than a mere temporary malady. It must be a serious sickness, lasting, or likely to last, so long as to interfere substantially with the interests of the employer. Thus, where the period of the contract is three months, the illness of the servant for a day and a half does not entitle the employer to dismiss the servant, and, if he does so, he renders himself liable to an action for a breach of the contract. *Gaynor* v. *Jonas*, 104 App. Div. 35.

Partner; power of, to borrow money and execute chattel mortgage; fraud cannot be shown under a general denial.— Copartners are liable for money borrowed by one of them on the firm credit, whether applied to the firm business or misapplied, and to secure such loan one partner, without consulting his copartner, can execute a valid chattel mortgage in the firm name. Such transactions are within the apparent scope of copartnership business. *Semble*, a partner defending the foreclosure of such chattel mortgage cannot, under a general denial, maintain that

the mortgage was executed pursuant to a scheme to defraud him. Weight of evidence considered. *Cohen* v. *Miller*, 46 Misc. Rep. 106.

"Personal injuries" to a passenger on a street car; the action is for breach of contract, not for an assault.— The pleadings in an action brought in this court against a street railroad company were oral. The complaint was "for personal injuries," and, as amplified by the bill of particulars, alleged that the plaintiff on a certain day boarded a car of the defendant and tendered his fare, and that the conductor refused to accept such fare and, without cause or provocation, assaulted the plaintiff and threw him off the car, and that by reason of such misconduct the plaintiff was injured. *Held*, that the cause of action was for breach of contract, and was not for an assault within the meaning of section 1364 of the Greater New York charter. A bill of particulars is but an amplification of the complaint and does not operate to change the nature of the cause of action set forth in such complaint. *Hines* v. *Dry Dock, E. B. & B. R. R. Co.*, 75 App. Div. 391.

(*Section* 1364 *of the Charter is now section* 1 *of the Municipal Court Act* (*Laws* 1902, *chap.* 580), *and the reference is to subdivision* 1 *of each of these laws.*)

Physician or surgeon in the treatment of a patient; for what he is liable.— A physician and surgeon when treating a patient assumes two obligations, the *first*, that he possesses the reasonable degree of learning and skill which is ordinarily possessed by physicians and surgeons in the locality in which he practices and which is ordinarily regarded by those conversant with the employment as necessary to qualify him to engage in the business of practicing medicine and surgery; the *second*, that he will use reasonable care and diligence in the exercise of his skill and the application of his learning to accomplish the purpose for which he was employed, and that he will use his best judgment in exercising such skill and applying his knowledge. He is liable for an injury to his patient resulting from want of the requisite knowledge and skill or from his omission to exercise care or his failure to use his best judgment. He is not liable for a mere error of judgment provided he does what he thinks is best after a careful examination. He does not guarantee a good result. *MacKenzie* v. *Caman*, 103 App. Div. 246.

Quasi-contract; voluntary payment made under a mistake of law not recoverable; duress.— The jurisdiction conferred upon this court by its charter (Laws 1901, chap. 466, § 1364, subd. 1) and thereby confined to an action for breach of contract, express or "implied," does not give that court jurisdiction of an action to recover of the city a fine imposed upon the plaintiff by a city magistrate who had no jurisdiction to impose the fine. If such an action is maintainable it must be upon the theory of a *quasi*-contract and of such an action that court has no jurisdiction, and takes none under the word "implied." A voluntary payment of a fine made under a mistake of law cannot be recovered. General allegations of duress are insufficient where there

is no allegation or proof of facts constituting duress. *Harrington* v. *City of New York*, 40 Misc. Rep. 165.

(*Section* 1364 *of Laws* 1901, *chapter* 466, *is now contained in the Municipal Court Act* (*Laws* 1902, *chap.* 580, § 1, *subd.* 1).)

Salesman's contract for commissions and weekly drawings construed.— Plaintiff under his contract with the defendant was entitled to certain commissions and also "to draw the sum of fifty dollars per week for his personal use, same to be charged to his commission account." In an action to recover two weekly drawings, *held*, that since no time was fixed for the payment of commissions they were to be adjusted at the end of employment, and hence the right to weekly drawings accrued whether commissions had been earned or not. *Schwerin* v. *Rosen*, 45 Misc. Rep. 409.

Same; services with an association organized for political and not for business purposes, when enforceable.— Though an association, organized for political and not for business purposes, is not liable for debts contracted by its agents, except when express power to pledge its credit is given, or the fund for payment is already provided; yet when, at the time of plaintiff's employment, the fund is provided but is subsequently expended by the association in increasing the value of its plant, plaintiff can recover because the fund, applicable to plaintiff's payment, has been added to the property of the association, and the association by accepting such plant accepts the burdens incident to the benefit conferred by the agent's acts, and thus ratifies the employment. *Hosman* v. *Kinneally*, 45 Misc. Rep. 411.

Same; of a traveling salesman at a weekly salary; the employer is entitled to his exclusive services; the salesman is entitled to nothing during the week in which a breach occurs or thereafter.— Under a written contract, by the terms of which one of the parties thereto employs the other party as a traveling salesman at a salary of $25 per week and traveling expenses, for a term of six months, the employer is entitled to the exclusive services of the employee during the continuance of the contract, even in the absence of any provision to that effect in the written contract or of a concurrent or collateral agreement in respect thereto.

In the event of a breach of the contract by the employee he cannot recover any salary for the week during which the breach occurred, nor, in the absence of estoppel or waiver, for the rest of the contract period. *Seaburn* v. *Zachmann*, 99 App. Div. 218.

Statute of Frauds; contract for manufacture of goods; ratification.— Where a stranger purporting to act for the defendant made an oral contract with the plaintiff for the manufacture and delivery of castings to the defendant, and the castings were delivered under the contract to the defendant and charged to him by the plaintiff, the fact that the defendant retained them in his possession (without using them, however) and failed for more than two months to repudiate the contract

and to offer to surrender up the castings, although the plaintiff had rendered statements charging him with the contract price and had on several occasions demanded payment of the defendant and his agents, is not sufficient to constitute a ratification of the unauthorized contract. A contract for the molding of castings from patterns is not one of sale, but one for the manufacture of goods not *in esse;* it is not, therefore, within the Statute of Frauds. *McKenna* v. *Springer*, N. Y. Law Journal, March 5, 1904, SEAMAN, J., sitting in the twelfth district, Borough of Manhattan, February, 1904.

Notes to section 1, subdivision 5.

Foreign corporation, having an office in said city, as surety upon a city marshal's bond.— The jurisdiction of this court to render judgment against a foreign corporation, having an office in said city and being surety on the bond of a city marshal, is to be determined by the Municipal Court Act (Laws 1902, chap. 580, § 1, subds. 5 and 18), and under these subdivisions, when read together, there is no jurisdiction where the plaintiff claims more than $500. Section 296 of said act authorizing a justice of the Supreme Court to order prosecution in the said Municipal Court of a marshal's bond — without limitation as to its amount — cannot aid the plaintiff and is to be condemned as an attempt to give such a justice power to confer upon the said Municipal Court jurisdiction in such a case beyond $500. *Frieland* v. *Union Surety Co.*, 43 Misc. Rep. 38.

Notes to section 1, subdivision 6.

Person indebted to judgment debtor.— An action brought under section 1391 of the Code of Civil Procedure, as amended by chapter 461 of the Laws of 1903, against a person indebted to a judgment debtor, because of the failure of such person to satisfy an execution issued under the said section to the extent of his obligation to the judgment debtor is to be regarded as an action upon the judgment, and hence, if the judgment was recovered in the Supreme Court, the Municipal Court of the city of New York has not jurisdiction thereof. Such an action is not one to foreclose a lien upon a chattel, within the meaning of subdivision 10 of section 1 of the Municipal Court Act. A lien defined. *Weissel* v. *Old Dominion S. S. Co.*, 99 App. Div. 568.

Notes to section 1, subdivision 7.

Action will lie for penalty although there has been no conviction for misdemeanor.— Such conviction is not a condition precedent to the maintenance of an action for the recovery of a penalty. The result of a criminal action would be no adjudication in the civil action under section 1481 of the charter. *The City of New York* v. *Williams*, N. Y. Law Journal, July 13, 1905, JOSEPH, J., seventh district, Manhattan.

Cabs standing in front of hotels (not at hack stands) in the city of New York must pay a license fee of $25 in addition to the $3 license fee.— Livery-stable-keepers, doing business in the city of New York, who make an agreement with the proprietor of a hotel in that city to supply carriages or cabs to that hotel and who, with the written consent of such proprietor, but without the consent of the city, keep a number of cabs standing in front of the hotel awaiting passengers, must, in addition to the license fee of $3 imposed on special hacks by sections 456 and 457 of the Revised Ordinances of the city of New York, pay for each of such cabs the additional fee of $25, imposed pursuant to section 12 and 13 of the ordinance approved May 22, 1899, upon hacks using, with the written consent of the owner or lessee of the abutting premises, a public street as a private hackstand. The enactment of the ordinance of May 22, 1899, was within the power of the municipal legislature. *City of New York* v. *Reesing*, 77 App. Div. 417.

Fire department; failure to provide such means of communication as the fire commissioner shall direct.— Section 762 of the charter of the city of New York provides that "the owners and proprietors of * * * hotels * * * shall provide such means of communicating alarms of fire * * * as the fire commissioner * * * may direct." No specific means of communication was directed by the order of the fire commissioner given to the defendant. In an action for the penalty, *held*, that the fire commissioner must direct the means of communication; that no penalty can be recovered when the means of communication is left wholly to the conjecture of the defendant; that a failure to comply with an order, which is not within the reasonable meaning of the statute, is not grounds for action for the penalty. *Hayes* v. *Brennan*, 45 Misc. Rep. 413.

Milk cans, unlawful detention of; Domestic Commerce Law, section 29, as amended in 1902.— In an action to recover a penalty under section 29 of the Domestic Commerce Law (L. 1896, chap. 376, as amended in 1902), which provides that "No person shall, without the consent of the owner or shipper, or his agent, use, sell, dispose of, buy or traffic in any can irrespective of its condition, or the use to which it may have been applied, belonging to any dealer in or shipper of milk or cream in this state," the condition of the can is material and where upon plaintiff's proof before resting that he found the can in question with its top cut off and full of ashes beside the house of the defendant, who said that it was her ash can and that the ashman had given it to her, the court dismissed the complaint, the judgment entered in favor of defendant will be reversed and a new trial granted in order that the facts in regard to the condition of the can may be more fully presented. *Schmidt* v. *Justus*, 46 Misc. Rep. 459.

Quasi-contract.— The jurisdiction conferred upon this court by the charter (Laws 1901, chap. 466, § 1364, subd. 1) and thereby confined to an action for breach of contract, express or "implied," does not give

the court jurisdiction of an action to recover of the city a fine imposed upon the plaintiff by a city magistrate who had no jurisdiction to impose the fine. If such an action is maintainable it must be upon the theory of a *quasi*-contract, and of such an action the court has no jurisdiction and takes none under the word "implied." *Harrington* v. *City of New York*, 40 Misc. Rep. 165.

Railroad transfers.— In an action brought against a street railroad company for refusing to issue transfers as required by law, the plaintiff may recover the statutory penalty for each refusal. *Lux* v. *New York City Ry. Co.*, 45 Misc. Rep. 223.

Stock-books.— For three separate refusals to exhibit stock-books, as required by section 29 of the Corporation Stock Law, the defendants are liable but for one penalty where it is admitted that the plaintiffs' several demands for inspection were for the purpose of getting certain definite information once for all. *Walcott* v. *Little*, 46 Misc. Rep. 96. See *Griffin* v. *Interurban St. R. R. Co.*, 179 N. Y. 438.

Tenement-house repairs.— An order of the tenement-house commissioner, requiring the landlord of a tenement-house to make repairs thereon, *is not a lien* or incumbrance within the meaning of a subsequent conveyance of the property by a short form full covenant warranty deed, free and clear of all incumbrances. *Golland* v. *Bove*, per FALLON, J., N. Y. Law Journal, February 10, 1904.

Voluntary payment of a fine under a mistake of law cannot be recovered. *Harrington* v. *City of New York*, 40 Misc. Rep. 165.

Notes to section 1, subdivision 9.

Jurisdiction in replevin, how determined.— The jurisdiction of this court in replevin is limited and determined solely by the value of the chattels ($500) and the fact that the damages claimed for their detention exceed that sum does not affect jurisdiction. *Syms* v. *American Automobile Storage Co.*, 43 Misc. Rep. 395.

Lost property.— Finder of articles lost in large retail store is entitled to possession thereof as against the proprietor of the store. The finder of the property is a voluntary bailee for the owner, if ever he should come forward to reclaim it. An action of replevin will lie in favor of the finder against any person who detains possession from him. *White* v. *Daniels*, N. Y. Law Journal, January 9, 1904, JOSEPH, J., sitting in the seventh district, Borough of Manhattan.

Notes to section 1, subdivision 10.

See also notes to section 137.

Artisans' lien; dependent on continued possession; repairs to automobile; warehouse lien.— The right of lien under section 70 of the Lien Law (Laws 1897, chap. 418) for reasonable charges for work done and materials furnished in making repairs to personal property at the

request or with the consent of the owner, is dependent upon the continued possession of the property by the one claiming the lien.

In the absence of statutory provision, a garage-keeper has no artisans' lien for the amount due for repairs to and supplies for an automobile which the owner, during the time it was kept at the garage, had and exercised the right to use at his pleasure, nor has the keeper a warehouse lien on the automobile, it not having been "stored" within the meaning of section 73 of the Lien Law. *Smith* v. *O'Brien*, 46 Misc. Rep. 325.

Boarding-house keeper.— The lien of a boarding-house keeper (Laws 1897, chap. 418, § 71, as amended Laws 1899, chap. 380) gives him no lien on property brought upon the premises by a boarder, nor any right to detain it for board, where the legal right to both the title and possession of the property were then in another, and this because the true owner cannot, under the Constitution, be divested of his property except by due process of law. *Barnett* v. *Walker*, 39 Misc. Rep. 323.

Chattel mortgage; when an action is not upon; cost price when evidence of value.— This court has jurisdiction of an action brought by a chattel mortgagor against the mortgagee for selling the mortgaged chattels by mistake after receiving them back from her after default and agreeing to keep them for her until she was financially able to take them again, as such an action arises on the bailment to keep the chattels, and not on the chattel mortgage, and therefore is not within the prohibition of section 139 of the Municipal Court Act (Laws 1902, chap. 580.) Where the identity of goods is lost, their agreed cost price is evidence of their value. *Goodman* v. *Baumann*, 43 Misc. Rep. 83.

Liens of hotel, apartment hotel, inn, boarding and lodging house keepers.—A keeper of a hotel, apartment hotel, inn, boarding house or lodging house, except an emigrant lodging house, has a lien upon, while in possession, and may detain the baggage and other property brought upon their premises by a guest, boarder or lodger, for the proper charges due from him, on account of his accommodation, board and lodging, and such extras as are furnished at his request. If the keeper of such hotel, apartment hotel, inn, boarding or lodging house knew that the property brought upon his premises was not, when brought, legally in possession of such guest, boarder or lodger, or had notice that such property was not then the property of such guest, boarder or lodger, a lien thereon does not exist. An apartment hotel within the meaning of this section includes a hotel wherein apartments are rented for fixed periods of time, either furnished or unfurnished, to the occupants of which the keeper of such hotel supplies food, if required. A guest of an apartment hotel, within the meaning of this section, includes each and every person who is a member of the family of the tenant of an apartment therein, and for whose support such tenant is legally liable. (*Laws* 1905, *chap.* 206, *amending section* 71 *of chap.* 418 *of the Laws of* 1897, *entitled* "*An act in relation to liens, constituting*

chap. 49 *of the general laws," as amended by chap.* 380 *of the Laws of* 1899.)

Notice of lien, contents of.— The notice of lien shall state:

1. The name and residence of the lienor; and if the lienor is a partnership or a corporation, the business address of such firm, or corporation, the names of partners and principal place of business, and if a foreign corporation, its principal place of business within the state.

§ 2. This act shall take effect September first nineteen hundred and five. (*Laws* 1905, *chap.* 96, *amending subd.* 1 *of section* 9 *of chap.* 418 *of the Laws of* 1897, *entitled "An act in relation to liens, constituting chap.* 49 *of the general laws.")*.

Person indebted to judgment debtor.— An action brought under section 1391 of the Code of Civil Procedure, as amended by Laws 1903, chapter 461, against a person indebted to a judgment debtor, because of the failure of such person to satisfy an execution issued under the said section to the extent of his obligation to the judgment debtor, is to be regarded as an action upon the judgment, and hence, if the judgment was recovered in the Supreme Court, the Municipal Court of the city of New York has no jurisdiction thereof. Such an action is not one to foreclose a lien upon a chattel within the meaning of subdivision 10 of section 1 of the Municipal Court Act. A lien defined. *Weissel* v. *Old Dominion SS. Co.*, 99 App. Div. 568.

Public cartman in New York city; when he is not entitled to a lien upon goods transported.— A public cartman in the city of New York, who is employed to move a quantity of household goods, is not, in the event of the refusal of his employer to pay his charge for transportation, entitled to a lien upon the goods under the ordinances of the city of New York relating to the liens of public cartmen, when it appears that the goods were injured in transit to an amount in excess of the charge for cartage, and also that the cartman did not convey the property to either of the places specified in the ordinance or send the notice required by the terms thereof. *Browning* v. *Belford*, 83 App. Div. 144.

Stallions; liens for services of, amended by Laws 1904, chapter 261.

Warehouse lien.— In the absence of statutory provision, a garage-keeper has no artisan's lien for the amount due for repairs to and supplies for an automobile which the owner, during the time it was kept at the garage, had and exercised the right to use at his pleasure, nor has the keeper a warehouse lien on the automobile, it not having been "stored" within the meaning of section 73 of the Lien Law. *Smith* v. *O'Brien*, 46 Misc. Rep. 325.

Notes to section 1, subdivision 12.

Setting aside final order.— It *seems*, that under subdivision 19 of section 1 of the Municipal Court Act (Laws 1902, chap. 580) a justice

has power to set aside a final order in summary proceedings and to grant a new trial. *Stein* v. *Kesselgrab*, 45 Misc. Rep. 652.

Squatter; summary removal of; question of title; removal of proceeding as in an action not applicable; amendment of technical errors in pleading.— The fact that the question of title is raised collaterally in a proceeding instituted in the Municipal Court of the city of New York under subdivision 4 of section 2232 of the Code of Civil Procedure for the summary removal of an alleged squatter from land claimed to be owned by the petitioner does not serve to oust the Municipal Court of jurisdiction. The real issue involved in the proceeding is as to the right to the possession of the premises, and the provisions of the Code of Civil Procedure, requiring the removal of an action brought in Justice's or Municipal Court, where the determination of title to real estate is involved, have no application to such a proceeding. Where the denials contained in the answers interposed in such a proceeding are objectionable in form because of the violation of a technical rule of pleading, but are not misleading, the party interposing such an answer should be permitted to amend the same. *Van Deventer* v. *Foster*, 87 App. Div. 62.

NOTE.— The law for removal of an action was repealed by Laws 1904, chap. 598.

Verification of a petition by a domestic corporation; jurisdiction assailable for the first time on appeal; defect in an allegation of the service of a demand for rent or possession.— An agent of a domestic corporation may, and an officer thereof need not, verify its petition to initiate summary proceedings to dispossess its tenant. (Code Civ. Proc., §§ 525, subd. 1; 2235.) A question which affects the jurisdiction of this court may be raised for the first time on an appeal. This court does not acquire jurisdiction of such proceedings where the petition therein, although stating that the tenant was served with a three days' notice to pay rent or yield possession, "as prescribed in chapter 17, title 2, section 2240 of the Code of Civil Procedure, for the service of a precept," fails to state by which of the three methods, prescribed in said section, service was made. *Matter of Stuyvesant Real Estate Co.*, 40 Misc. Rep. 205.

Notes to section 1, subdivision 13.

Horse, sale of.— When action is for fraud and deceit in the sale of a horse, recovery cannot be had for breach of warranty. *Postal* v. *Cohn*, 87 App. Div. 27. See *Bunke* v. *N. Y. Telephone Co.*, 46 Misc. Rep. 97, 98.

Merchandise in bulk under Laws 1902, chapter 528; fraud in the sale of; attachment; judgment by default; summons not personally served.— A judgment cannot be rendered by default pursuant to section 91 of the New York Municipal Court Act (Laws 1902, chap. 580) or sec-

tion 2918 of the Code of Civil Procedure, in an action where the defendant has not appeared or been personally served with the summons, but in which, however, his property has been attached, unless it appears that the affidavits upon which the warrant of attachment was issued were sufficient to authorize it. On an application for a warrant of attachment on the ground that the defendant has disposed of his property with intent to defraud his creditors, the burden of proving the fraudulent intent is upon the party applying for the writ, and circumstances which create a strong suspicion of fraud, but yet fall short of *prima facie* proof thereof, are not sufficient. An averment in the moving affidavits that, upon a sale by the defendant of his entire stock of merchandise in bulk, the defendant and the purchaser did not do the things required by chapter 528 of the Laws of 1902, which provides that the sale of an entire stock of merchandise in bulk is fraudulent and void against the creditor of the seller, unless, at least five days before the sale, the seller and the purchaser do certain things, is insufficient to establish the violation of the statute in question, where it is evident that the averment is not based upon personal knowledge, and the situation of the parties is not such as to create a presumption of knowledge and no sources of information are disclosed. *Semble*, that the fraud, which, by the Code of Civil Procedure, is made the ground for an attachment, is an actual and intentional or moral fraud, and not one which is declared to be such by statute because of the omission of certain specified formalities. *Mohlman Co.* v. *Landwehr*, 87 App. Div. 83.

Sale of entire retail stock to one person; Laws 1902, chapter 528, construed.— The grammatical construction of the act is open to criticism whether the legislative intent was to permit or prohibit the sale of an entire stock of merchandise in bulk is an open question. The intent was if a man so sold his stock in bulk the provisions of the act relative to the making of the inventory and the notice by the purchaser should be complied with, and there must be proof of such compliance before the plaintiff can recover on an assigned claim against the defendant. This is an action based upon allegations of fraud which are never presumed to be true, but must always be proved to be so. The plaintiff relies upon the statute and must bring himself directly within it.

The validity of the act criticized, and an order of arrest refused. *Friedland* v. *Wexler*, N. Y. Law Journal, September 14, 1903, BENNET, J., sitting in the seventh district, borough of Manhattan, in August, 1903. See also *Veit* v. *Collins*, 39 Misc. Rep. 40.

Notes to section 1, subdivision 14.

Assault by street car conductor; not within scope of employment when parties have left car; this court without jurisdiction in such action. — The defendant's conductor refused to return plaintiff's change after

payment of fare. She left the car before reaching her destination and awaited on the defendant's premises the return trip of the conductor. After renewed demands the conductor paid plaintiff and thereafter struck her. *Held,* to warrant a recovery against the defendant railroad company the relation of carrier and passenger must exist, and this relation was ended when the plaintiff voluntarily left the car. There is a distinction between temporarily alighting for refreshments from the trains of a railroad company where the right to continue the journey exists and alighting from the car of a street railway where a new fare must be paid to continue the journey. Of this latter requirement the court will take judicial notice. That the conductor, having ended his trip and left the car at the time of the assault, was not engaged in the performance of any duty the defendant owed a passenger, nor was he acting within the scope of his authority. This court has no jurisdiction of such action. *Reilly* v. *New York City Railway Co.*, 46 Misc. Rep. 72. See also *Hines* v. *Dry Dock, etc., R. R. Co.*, 75 App. Div. 391.

Carrier of passengers; injury to the person through negligence of; when verdict for plaintiff is properly set aside though no evidence is introduced for defendant.— In an action for damages for injury to plaintiff by reason of negligence in starting a car, which plaintiff was about to board, no evidence was introduced on behalf of defendant. The plaintiff testified that the accident was on one side of the street, and her friend, and only witness, testified that it was on the other side; there was no proof that a signal was given by any one for the car to stop. The plaintiff's credibility was affected by the fact that she testified both that she was in bed for two weeks following the accident and also that she verified the complaint at her lawyer's office nine days thereafter. *Held,* no abuse of discretion in trial justice in setting aside verdict for plaintiff. Same holding in husband's action for loss of services. *Surkin* v. *Interborough Street R. Co.*, 45 Misc. Rep. 407.

Collision; city ordinance giving right of way to vehicles moving in certain directions not to be taken from consideration of jury; no reversal if error is in favor of appellant.— As an ordinance of the city of New York gives right of way to vehicles moving north and south over those moving east, it is error to charge that vehicles have equal rights; or when such ordinance is put in evidence to take it from the consideration of the jury. But if the charge be more fair to plaintiff than he is entitled to it is not ground for reversal of judgment for defendant. *Kroder* v. *Interurban Street R. Co.*, 46 Misc. Rep. 118.

Dog; damages for bite of; scienter must be shown.— Scienter must be shown in an action to recover damages for bite of dog. Classical and modern precedent stated. When evidence insufficient to establish scienter. *Bogodonow* v. *N. Y. Lumber & Storage Co.*, 46 Misc. Rep. 120.

False imprisonment; a complaint alleging, dismissed, although it contains other allegations constituting a cause of action within the court's jurisdiction.— The complaint in an action, brought in this court, read as follows: "The defendants are indebted to plaintiff in the sum of Five hundred dollars ($500.00), in that they co-operated, inveigled and kidnapped plaintiff from Brooklyn and carried him to Yucatan, Mexico, against his will, to his loss,

"1st. Loss of time from March 12, 1903, to April 4, 1903, at $2.00 per day 22 days	$44 00
"2nd. To expense while away, 75c per day 22 days	16 50
"3rd. To passage from Yucatan to Brooklyn	25 50
	$86 00
"To detention, imprisonment, loss of peace of mind	414 00"

The Municipal Court of the city of New York is expressly prohibited from entertaining jurisdiction of an action to recover damages for false imprisonment (Laws 1902, chap. 580, § 1, subd. 14). *Held*, that it was obvious from the language of the complaint that false imprisonment was one of the wrongs for which the plaintiff sought to recover damages; that, consequently, the court could not afford the plaintiff any redress, notwithstanding the fact that the complaint contained other allegations, which, if they had stood alone, might have constituted a cause of action of which the court had jurisdiction. *Bellezzire* v. *Camardella*, 95 App. Div. 176, 177.

Notes to section 1, subdivision 15.

Decision of another justice.— One judge cannot, upon mere motion, set aside the decision of another judge, upon allegations that the latter had erred as to any of the questions submitted to his determination. *People* v. *National Trust Co.*, 31 Hun, 26.

Order not appealable.— An order of a justice of this court denying a motion to vacate an order of arrest is not appealable, as such an order is not enumerated in the Municipal Court Act (Laws 1902, chap. 580, §§ 253, 254, 255, 256, 257.) The scope of section 20 of said act considered. *Leavitt* v. *Katzoff*, 43 Misc. Rep. 26. See also *Hyman* v. *Legal*, 44 Misc. Rep. 226; *Manelly* v. *Mayers*, 43 Misc. Rep. 380, and *Smith* v. *Ely*, 45 Misc. Rep. 458.

"Personal injuries" to a passenger on a street car; action is for breach of contract, not for an assault.— The pleadings in an action brought in this court against a street railroad company were oral. The complaint was "for personal injuries," and, as amplified by the bill of particulars, alleged that the plaintiff on a certain day boarded a car of the defendant and tendered his fare, and that the conductor refused to accept such fare and, without cause or provocation, as-

saulted the plaintiff and threw him off the car, and that by reason of such misconduct the plaintiff was injured. *Held*, that the cause of action was for breach of contract, and was not for an assault within the meaning of section 1364 of the Greater New York charter. A bill of particulars is but on amplification of the complaint, and does not operate to change the nature of the cause of action set forth in such complaint. *Hines* v. *Dry Dock, E. B. & B. R. R. Co.*, 75 App. Div. 391. See also *Reilly* v. *N. Y. City Railway Co.*, 46 Misc. Rep. 72.

(*Section* 1364 *of the charter is now section* 1 *of the Municipal Court Act* (*Laws* 1902, *chap.* 580), *and the reference is to subdivision* 1 *of this law.*)

Notes to section 1, subdivision 18.

Foreign corporation, having an office in said city, as surety upon a city marshal's bond.— The jurisdiction of this court to render judgment against a foreign corporation, having an office in said city and being surety on the bond of a city marshal, is to be determined by the Municipal Court Act (Laws 1902, chap. 580, § 1, subds. 5 and 18), and under these subdivisions, when read together, there is no jurisdiction where the plaintiff claims more than $500.

Section 296 of said act, authorizing a justice of the Supreme Court to order prosecution in the said Municipal Court of a marshal's bond — without limitation as to its amount — cannot aid the plaintiff, and is to be condemned as an attempt to give such a justice power to confer upon the said Municipal Court jurisdiction in such a case beyond $500. *Frieland* v. *Union Surety Co.*, 43 Misc. Rep. 38.

Nonresident plaintiff against a foreign corporation having a place of business in the city of New York.— Jurisdiction of an action brought in this court by a nonresident plaintiff against a foreign corporation having a place in said city for the regular transaction of its business is controlled by subdivision 3, and not by subdivision 2, of section 25 of the Municipal Court Act (Laws 1902, chap. 580), and under subdivision 3 is properly brought in a district of said city in which the defendant corporation has a place for the regular transaction of a portion of its business, although it has a general office for the regular transaction of its business in another district in said city. *Goldzier* v. *Central R. R. of N. J.*, 43 Misc. Rep. 667.

Proof necessary to recover against a corporation for professional services rendered to employees.— To charge a corporation with the value of professional services rendered by a physician to its employees it must be shown that such services were rendered for the benefit of the corporation, or in satisfaction of a claim against it, or that the officers, at whose instance the services were rendered, had authority to bind the corporation in this respect. *Harris* v. *Vienna Ice Cream Co.*, 46 Misc. Rep. 125.

Notes to section 1, subdivision 19.

See also section 255, "New Trial; Fraud, or Newly-discovered Evidence."

Decision of another justice.— One judge cannot, upon mere motion, set aside the decision of another judge, upon allegations that the latter had erred as to any of the questions submitted to his determination. *People* v. *National Trust Co.*, 31 Hun, 26.

Restoring case to the calendar.— Where certain cases in this court were dismissed for nonappearance of either party within the time required, the justice had no authority to restore the causes to the calendar and proceed to the trial thereof, except by defendant's express consent, or by his voluntary appearance, without objection after service of a notice of motion on him for reinstatement. *Eichner* v. *Cohen*, 91 N. Y. Supp. 357.

Setting aside final order in summary proceedings.— It *seems*, that under subdivision 19 of section 1 of the Municipal Court Act (Laws 1902, chap. 580) a justice has power to set aside a final order in summary proceedings and to grant a new trial. *Stein* v. *Kesselgrub*, 45 Misc. Rep. 652.

Stipulation.— While the court has power to relieve a party from a stipulation, thoughtlessly or improvidently made by his attorney, it is not justified in exercising this power in favor of a plaintiff after the stipulation has been fully executed on the part of the defendant, where it does not appear that the defendant was guilty of any fraud or collusion, or that there has been any change in the circumstances of the parties since the stipulation was made, or that anything has transpired which was not foreseen and contemplated by the parties. *Morris* v. *Press Publishing Co.*, 98 App. Div. 143.

Supplementary proceedings on a judgment recovered in a Municipal Court, a transcript of which was docketed in the county clerk's office; the Supreme Court may set them aside, but cannot vacate the judgment.— Where a transcript of a judgment recovered by default in this court for the borough of Brooklyn is docketed in the office of the clerk of the county of Kings, under *section* 1369 *of the Greater New York Charter* (*Laws* 1897, *chap.* 378) *and sections* 3017 *and* 3220 *of the Code of Civil Procedure*, and, after the return of an execution unsatisfied, supplementary proceedings are instituted thereunder, the Supreme Court is without jurisdiction to vacate the judgment on the ground that the judgment debtor had never been served with the summons and complaint. The Supreme Court has jurisdiction, however, to stay or set aside the execution and the supplementary proceedings, as these matters flowed out of the filing of the transcript and of the docketing of the judgment. *Johnson* v. *Manning*, No. 1, 75 App. Div. 285.

Vacating void judgment not rendered in time.— Where a justice of this court renders judgment in a case tried before him, which judgment

is void because it was not rendered within the fourteen days prescribed by *section* 230 *of the Municipal Court Act* (*Laws* 1902, *chap.* 580), the justice has power, under section 254 of that act, to make an order vacating such judgment. Such order is appealable to the Appellate Division *under section* 257 of the Municipal Court Act. Upon such an appeal the court is bound by the contents of the return made by the justice and cannot consider statements in the appellant's brief, not supported by the return, tending to show that the judgment was rendered within the statutory time. *Stern* v. *Fleck*, 102 App. Div. 272.

Vacating judgment because a material witness for the defeated party did not appear on the trial.— A verdict or judgment cannot be vacated upon this ground. *Erichson* v. *Sidlo*, 76 App. Div. 347.

Weight of evidence.— Under section 254, this court has power to set aside a verdict and grant a new trial in an action, on the ground that the verdict is against the weight of evidence. *Newbound* v. *Interurban Street R. R. Co.*, 42 Misc. Rep. 525.

Notes to section 2, "No Jurisdiction in Certain Cases."

Amount involved; remission of excess; Municipal Court Act, section 250.— Where both the summons and the complaint in an action commenced in this court demand judgment for $500 and interest, a denial of a motion to dismiss the complaint upon the ground of want of jurisdiction is reversible error. The provision of section 250 of the Municipal Court Act permitting a party to remit the excess if the sum found due "exceeds the sum for which the court is authorized to enter judgment" applies only to cases where said court has acquired jurisdiction in the first instance. *Smith* v. *Dunn*, 46 Misc. Rep. 475.

Assault by street car conductor; not within scope of employment when parties have left car; this court without jurisdiction in such action.— The defendant's conductor refused to return plaintiff's change after payment of fare. She left the car before reaching her destination and awaited on the defendant's premises the return trip of the conductor. After renewed demands the conductor paid plaintiff and thereafter struck her. *Held*, to warrant a recovery against the defendant railroad company the relation of carrier and passenger must exist, and this relation was ended when the plaintiff voluntarily left the car. There is a distinction between temporarily alighting for refreshments from the trains of a railroad company where the right to continue the journey exists and alighting from the car of a street railway where a new fare must be paid to continue the journey. On this latter requirement the court will take judicial notice. That the conductor, having ended his trip and left the car at the time of the assault, was not engaged in the performance of any duty the defendant owed a passenger, nor was he acting within the scope of his authority. This court has no jurisdiction of such action. *Reilly* v. *New*

York City Railway Co., 46 Misc. Rep. 72. See also *Hines* v. *Dry Dock, etc., R. R. Co.*, 75 App. Div. 391.

Decision of another justice.— One judge cannot, upon mere motion, set aside the decision of another judge, upon allegations that the latter had erred as to any of the questions submitted to his determination. *People* v. *National Trust Co.*, 31 Hun, 26. *See exception to this rule. Stremberg* v. *Di Salvo*, 38 Misc. Rep. 139.

Equity jurisdiction; reformation of written instrument; action for use and occupation; parol evidence to add to lease.— The reformation of a written instrument is not within the jurisdiction of this court, and in an action to recover for use and occupation, a denial of a motion to strike out a separate defense, setting up the existence of a written lease of a basement and alleging that through inadvertence the word "cellar" had been omitted therefrom contrary to the intention of both parties, is erroneous, and oral evidence that the lease was intended to include the cellar is inadmissible. *Kraus* v. *Smolen*, 46 Misc. Rep. 463.

Fictitious name; when the judgment is fatally defective and an execution issued thereon is void.— The summons in an action brought in the Municipal Court of the city of New York was entitled as follows:

"Mary Markowitz, Plaintiff, *against* Etta Lipsky and John Goldberg, Defendant.	*Free summons.* *First names being fictitious, unknown to plaintiff."*

The certificate of service recited that the marshal served the summons "on John Goldberg, one of the within named defendants * * * and that I know the person to be one of the defendants therein named."

The docket, under the title "Markowitz against Lipsky et al.," recited that the plaintiff appeared in person and that the complaint was for goods sold and delivered; that the defendant appeared in person, and that judgment was rendered for twenty dollars and twenty-five cents damages and one dollar costs. The record did not show for or against whom the judgment had been rendered, or that Goldberg was a party to the action or appeared therein. An execution was then issued directing the marshal to collect the amount due out of "the separate property of the judgment debtor, John Goldberg, first name fictitious, real name unknown to plaintiff." This execution was levied upon property belonging to Nathan M. Goldberg, who was one of the persons upon whom the summons in the action was served, and who appeared in answer to the summons.

In an action brought by Nathan M. Goldberg against Markowitz and the marshal who levied the execution to recover damages for the alleged conversion of the property levied upon, it was held that the

record of the judgment was fatally defective, and that the execution issued thereon was void upon its face and constituted no protection to the marshal or to any one acting under it; that the docket did not show upon its face that any judgment had been rendered in favor of the plaintiff against the defendant. That as Lipsky was the only defendant named in the record, there was no presumption that the proceeding was against any one but Lipsky. *Goldberg* v. *Markowitz*, 94 App. Div. 237, 238.

Interpleader, when permitted.— The Municipal Court Act, section 187, permits an interpleader only in an action on contract, or to recover a chattel; hence, where a defendant has been interpleaded in an action for conversion and the original defendant is released by plaintiff, the court is ousted as to jurisdiction as to both. *Semble*, an assignment cannot be attacked on the ground of fraud under a general denial. *Midler* v. *Lese*, 45 Misc. Rep. 638.

Jurisdiction is lost by the justice unless he files his decision within fourteen days. *Van Valis* v. *Charonca*, 40 Misc. Rep. 226. See also *Penniman* v. *La Grange*, 23 Misc. Rep. 226; *Wallace* v. *Harris*, 40 Misc. Rep. 216; *Lambert* v. *Salomon*, 28 App. Div. 562.

Person indebted to judgment debtor.— An action brought under section 1391 of the Code of Civil Procedure, as amended by chapter 46 of the Laws of 1903, against a person indebted to a judgment debtor, because of the failure of such person to satisfy an execution issued under the said section to the extent of his obligation to the judgment debtor, is to be regarded as an action upon the judgment, and hence, if the judgment was recovered in the Supreme Court the Municipal Court of the city of New York has not jurisdiction thereof.

Such an action is not one to foreclose a lien upon a chattel, within the meaning of subdivision 10 of section 1 of the Municipal Court Act.

A lien defined. *Weisel* v. *Old Dominion SS. Co.*, 99 App. Div. 568.

Quasi-contract; voluntary payment made under a mistake of law not recoverable; duress.— The jurisdiction conferred upon this court by the charter (Laws 1901, chap. 466, § 1364, subd. 1) and thereby confined to an action for breach of contract, express or "implied," does not give the court jurisdiction of an action to recover of the city a fine imposed upon the plaintiff by a city magistrate who had no jurisdiction to impose the fine. If such an action is maintainable it must be upon the theory of a *quasi*-contract and of such an action the court has no jurisdiction and takes none under the word "implied." A voluntary payment of a fine made under a mistake of law cannot be recovered. General allegations of duress are insufficient where there is no allegation or proof of facts constituting duress. *Harrington* v. *City of New York*, 40 Misc. Rep. 165.

Squatter; summary removal of, from land; question of title; removal of proceeding as in an action not applicable; amendment of technical errors in pleading.— The fact that the question of title is raised col-

laterally in a proceeding instituted in the Municipal Court of the city of New York under subdivision 4 of section 2232 of the Code of Civil Procedure for the summary removal of an alleged squatter from land claimed to be owned by the petitioner does not serve to oust the Municipal Court of jurisdiction. The real issue involved in the proceeding is as to the right to the possession of the premises, and the provisions of the Code of Civil Procedure requiring the removal of an action brought in a Justice's or Municipal Court, where the determination of title to real estate is involved, have no application to such a proceeding. Where the denials contained in the answers interposed in such a proceeding are objectionable in form because of the violation of a technical rule of pleading but are not misleading, the party interposing such an answer should be permitted to amend the same. *Van Deventer* v. *Foster*, 87 App. Div. 62.

Note.— The law for removal of an action was repealed by Laws 1904, chap. 598.

Surety upon a city marshal's bond by a foreign corporation.— The jurisdiction of this court to render judgment against a foreign corporation, having an office in said city and being surety upon the bond of a city marshal, is to be determined by the Municipal Court Act (Laws 1902, chap. 580, § 1, subds. 5, 18), and under these subdivisions, when read together, there is no jurisdiction where the plaintiff claims more than $500. Section 296 of said act, authorizing a justice of the Supreme Court to order prosecution in the Municipal Court of a marshal's bond, without limitation as to its amount, cannot aid the plaintiff and is to be condemned as an attempt to give such justice power to confer upon said court jurisdiction beyond $500. *Frieland* v. *Union Surety Co.*, 43 Misc. Rep. 38.

§ 3. **Removal.**—(This section has been repealed by Laws 1904, chapter 598, section 1, having the remarkable title, "An Act to amend the Municipal Court Act of the City of New York with reference to rules of court and appeals," and is as follows:)

Section 1. Section three of the municipal court act of the city of New York is hereby repealed, but the repeal of such section shall not affect the prosecution of any action heretofore removed from said municipal court of the city of New York pursuant to the provisions of such section, and all proceedings in such actions shall be continued as though said section were* still in force and effect.

*So in original. It should be "was."

Note to sections 4, 5, 6, 7, and 8, "Contempt of Court."

Court order.— A court order should have a caption reciting the time, place, and term of court. A judge's order, however, is not vitiated because it contains such a caption, as the caption may be treated as surplusage. The body of an order may be examined for the purpose of determining whether it was made by a court or a judge. *Matter of Munson*, 95 App. Div. 23.

§ 11. **Board of justices.**— The justices of said court shall constitute the board of justices of the municipal court and discharge the functions thereof. They may elect a president from their own number and at pleasure remove him and elect a successor. All meetings of said board shall be public and all proceedings shall be recorded in its books of minutes, by its secretary and shall be preserved. Such board may designate a clerk of said court for one of said districts to act as secretary of said board, and from time to time substitute another and fix a compensation to be paid for such service, not exceeding the sum of five hundred dollars per annum. Such board may also designate an attendant of such court to act as attendant of said board, and from time to time substitute another, and fix a reasonable compensation to be paid for such service. Such board shall establish public rules relative to its meetings, which as far as possible shall be held at regular times, to the keeping and preservation of its minutes and to the public inspection of the same under the care of the secretary at reasonable times. (*As amended by Laws* 1904, *chap.* 735, *passed May* 14, 1904.)

§ 12. **Board to make rules.**

Subdivision 6 added, which reads as follows:

6. As to a calendar in each district of actions reserved generally, to which actions may be transferred notwithstanding the provisions of section* one hundred and ninety-three and one hundred and ninety-four of this act. (*This is a new subdivision added by Laws* 1903, *chap.* 282, *in effect April* 27, 1903.)

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*So in original. Should be "sections."

7. As to the justices who shall hold sessions of said court in each of the districts at times and places to be specified in said rules, which sessions shall begin at nine o'clock in the forenoon, and to provide for such a rotation of the justices holding the same as that each justice after holding court in his own district for one month shall sit in at least five of such other districts, at least once for a period of one month at a time previous to his return to the district for which he shall have been elected or appointed, provided that the justices elected or appointed for any borough shall hold court in such borough, but if a vacancy exists, or the illness or other inability of any justice assigned to hold court prevents his attendance, any other justice of said court may hold the same. Such rules respecting rotation and the designation of justices, shall be made on or before the first Monday of December in each year, and shall be published in the New York law journal, and one newspaper published in each borough at least once before the first day of January following and shall go into effect on such latter day. (*This is a subdivision added by Laws* 1904, *chap.* 598.)

Notes to section 12.

Section 193 of this act, referred to, relates to "adjournments; trial may be adjourned; when." And section 194 "adjournments longer than eight days; undertaking."

Pursuant to section 12, and as amended by chapter 282, Laws 1903, and by chapter 598, Laws 1904, the board of justices adopted the following:

RULES OF PRACTICE.

I. Court shall be held in each district on Monday, Tuesday, Wednesday, Thursday and Friday of each week, except in those districts where the justice elected or appointed therein shall otherwise direct.

II. Court shall be opened at 9 o'clock A. M. and close at 4 o'clock P. M. During months of July and August from 9 A. M. until 12 M.

III. The order of business in each court shall be as follows:

1. Summary proceedings.
2. Adjourned causes.
3. Returned causes.
4. Inquests.
5. Motions.
6. Trials.

IV. To entitle a cause to a place on the calendar, the summons must be returned with proof of service thereof to the clerk's office, and the calendar fee paid the day before the return day of the summons.

V. Where a plaintiff appears by attorney, the summons, unless a complaint is filed therewith, shall be indorsed with the name and address of the attorney for the plaintiff and a brief statement of the cause of action. Such indorsement shall be deemed an appearance within section 332 of the Municipal Court Act. Other process, pleadings and writings shall also be appropriately indorsed.

VI. When a bill of particulars is ordered the same shall be filed in the clerk's office within three days after such order is made.

VII. When a jury is demanded, the jury fee shall be forthwith paid to the clerk of the court by the attorney, or party making such demand. The jury shall be publicly drawn by the clerk from the panel under the supervision of the justice. Each additional venire requires an additional jury fee, but only the fee originally paid can be included as part of the costs in the judgment under section 238 of the Municipal Court Act.

VIII. If the original summons, or other process, or mandate of the court is not returned to the office of the clerk the court may indorse a dismissal of the action or proceeding upon the copy of such summons, mandate or process, or grant other appropriate relief, and award costs in proper cases, and such copy, summons, mandate, or process with such indorsement shall thereupon be filed with the clerk of the court, and shall have the same effect as if the original had been so in-

dorsed and filed, provided proof of service is made or written notice of appearance by an attorney is filed.

IX. Upon an application for an order removing an action to the City Court, County Court, or Supreme Court, as the case may be, the sureties upon the undertaking must attend and justify as to their sufficiency on the day of the presentation of the undertaking unless such justification is waived or adjourned by the court or by consent, or the undertaking is given by a duly authorized surety company.

X. The clerk shall not place a cause upon the calendar for trial on a day agreed upon in a stipulation unless such stipulation is approved by the justice in the district in which the action is pending.

XI. Causes set down for trial must be tried when reached unless legal grounds exist for an adjournment.

XII. Only one adjournment shall be granted in actions in which the amount claimed in the summons does not exceed $50, unless the justice for good cause shown shall otherwise direct.

XIII. Calendar or other fees paid to the clerk are in no case to be returned.

XIV. Motions may be brought on for hearing on not less than three days' notice unless otherwise provided by law.

XV. *Ex parte* applications may be made to any justice without regard to the district in which the action or proceeding is pending, or about to be commenced; the affidavit shall however state whether any previous application has been made, and if made, to what justice, and what order or decision was made thereon, and what new facts, if any, are claimed to be shown. It shall also state the residences of the parties. For failure to comply with this rule any order made on such application may be revoked or set aside. The denial of an *ex parte* application with the reason therefor may be endorsed thereon by the justice to whom the same is presented.

XVI. No approval of an undertaking given by a party or claimant to procure the discharge of a levy under an attachment shall be granted *ex parte*. The party or claimant ap-

plying for such approval shall give at least two days' notice of justification to the adverse party.

XVII. A stipulation to extend the time of the court within which to render a judgment or make a decision may be entered into between parties or their attorneys on the record in the minutes of a trial, or in a written stipulation signed to that effect.

XVIII. Affidavits of service of process must in all cases comply strictly with the provisions of Rule XVIII of the Supreme Court rules.

XIX. Costs shall not be awarded to a defendant who appears by attorney when there are no verified pleadings, unless a written notice of appearance is filed.

XX. The phrase "case on appeal" in sections 317 and 318 of the Municipal Court Act shall be deemed to refer simply to the justice's return on appeal as the same has been heretofore known. The phrase "including the evidence" shall be deemed to include all exhibits admitted in evidence.

XXI. In cases where attorneys may be represented by clerks, the clerk or clerks so appearing shall be only those whose certificates of clerkship shall have been filed in the office of the clerk of the Court of Appeals.

XXII. When a cause has been adjourned more than three times, by consent or stipulation, the court may of its own motion place it upon the calendar of causes RESERVED GENERALLY. It may be restored on three days' notice and placed upon the calendar for trial for a day subsequent. Parties may at any time consent to take a cause from the day calendar and place it upon the calendar of causes RESERVED GENERALLY.

RULES RELATIVE TO CLERKS AND ATTENDANTS.

I. The clerk, assistant clerk, interpreter and attendants of each court shall attend each day from 9 o'clock A. M. to 4 o'clock P. M., and at such other times as the justice may direct, except as otherwise provided by law. The stenographer shall be in attendance during the sessions of the court, and at such other times and places as the justice may direct.

II. The attendants shall maintain order in and about the court and the offices thereof.

III. The attendants and interpreter shall wear an official badge during the session of the court.

IV. During the session of the court the clerk thereof, or, in his absence, the assistant clerk, shall be in attendance therein, administer oaths, keep minutes and receive the verdict of a jury, and when not so employed the time of the clerk and assistant clerk shall be devoted to the business of the clerk's office.

V. The clerk of each court, or, in his absence, the assistant clerk, shall, on or before the third day of each month, make a statement in writing, duly verified by his oath, of moneys received for fees by him, as such clerk, during the preceding month, and on or before the day named pay in to the finance department of The City of New York all such moneys received by him for the use, or on behalf of the city, for the preceding month as required by law. A summary thereof shall thereupon be filed with the secretary of the board of justices, together with a detailed statement of the business of the court for the previous month.

VI. The clerks and assistant clerks shall keep and preserve full, correct and true records of the proceedings of the court and of their office, properly file and preserve all process, pleadings, mandates or other papers, deposit in bank all moneys paid to them, keep accurate accounts thereof, and shall faithfully perform the duties imposed upon them by chapter 580 of the Laws of 1902.

VII. When moneys are paid to persons other than parties or their attorneys the clerks shall require and file in their offices a written request from the party or the attorney entitled to such moneys to authorize such payment, and a receipt therefor.

Notes to section 12.

Force of rules.— Rules enacted by the board of justices of the Municipal Court, pursuant to section 12 of the Municipal Court Act (Laws 1902, chap. 580) have the force of law and are binding upon the individual justices. *Matter of Bolte*, 97 App. Div. 551, 552.

Notes to section 12, subdivision 6.

Case stricken from calendar cannot be restored except by consent.— A cause stricken from the calendar of the Municipal Court of New York, for failure of plaintiff to appear, cannot be restored to such calendar except by consent of defendant or by his voluntary appearance.

Where certain cases in this court were dismissed for nonappearance of either party within the time required, the justice had no authority to restore the causes to the calendar and proceed to the trial thereof, except by defendant's express consent, or by his voluntary appearance without objection after service of a notice of motion on him for reinstatement. *Eichner* v. *Cohen*, 46 Misc. Rep. 126; S. C., 91 N. Y. Supp. 357.

Notes to section 12, subdivision 9.

The law for the removal of an action was repealed by Laws 1904, chap. 598.

Notes to rule 15.

Ex parte applications.— Rule 15, which provides that *ex parte* applications may be made to any justice, only authorizes applications in actions pending in one district to a justice of another district for such orders as may be granted by a justice as distinguished from the court. *Matter of Bolte*, 97 App. Div. 551, 552.

Court order.— A court order should have a caption reciting the time, place, and term of court. A judge's order, however, is not vitiated because it contains such a caption, as the caption may be treated as surplusage. The body of an order may be examined for the purpose of determining whether it was made by a court or a judge. *Matter of Munson*, 95 App. Div. 23.

Decision of another justice.— One judge cannot, upon mere motion, set aside the decision of another judge, upon allegations that the latter had erred as to any of the questions submitted to his determination. *People* v. *National Trust Co.*, 31 Hun, 26. *See exception to this rule, Stromberg* v. *Di Salvo*, 38 Misc. Rep. 139.

Notes to section 13, "Court by Whom Held."

The requirement that a justice who is disqualified to try a cause, to transfer it to an adjoining district, is mandatory.— Where it appears that an action, brought in this court and transferred to a district not adjoining because of the disqualification of the justice, was brought in the proper district and no appeal is taken from an order denying defendant's motion to further transfer the cause, not to the district adjoining the one in which the action had been brought but to the district in which defendant resided, the objection that the district to which the transfer was made did not adjoin the district in which the action was brought was waived and could not be raised for the first

time on appeal from a judgment in favor of plaintiff. *Lesser* v. *Adolph*, 46 Misc. Rep. 265.

Bias or prejudice of justice.— It has been held by Mr. Justice O'Gorman in *People ex rel. Devery* v. *Jerome* (N. Y. Law Journal of November 12, 1901), and Mr. Justice Clarke in *People ex rel. Stein* v. *Brann* (N. Y. Law Journal of December 3, 1902), that a writ of prohibition against a magistrate to prevent his trying a case because of his bias or prejudice will not lie.

Note to section 15, "Action May be Continued before Another Justice."

Reviewing decision of another justice; exception to the rule.— The rule that one justice of this court cannot review the decision of another justice does not apply to a case where, after the defendant's motion to open his default has been denied, as he alleges, upon affidavits surreptitiously handed to the justice by or for the plaintiff after the argument of the motion and because of the justice's misconception that the defendant had paid the judgment voluntarily, the defendant applies, without leave from that justice, for leave to reargue and for a reargument of the motion to another justice brought, within eighteen days, into the Municipal Court district by the system of rotation in the assignment of its justices, who granted a reargument and also vacated the order of the first justice denying the motion to open the default — as the motion before the incoming justice is under the circumstances to be deemed practically a separate motion made on different or additional facts. *Stromberg* v. *Di Salvo*, 38 Misc. Rep. 139. See also *People* v. *National Trust Co.*, 31 Hun, 26.

Note to section 16, "Death or Removal of Justice not to Impair Proceedings."

Expiration of judge's term; successor may determine motion.— An order vacating a judgment of this court made by a justice of said court after the expiration of his term of office is a nullity. Under the provisions of section 16 of the Municipal Court Act, read in conjunction with section 254, a motion to set aside a judgment of said court and for a new trial, pending before and undecided by a justice thereof at the expiration of his term of office, may be heard and determined by his successor in office. *Gordon* v. *Trainor*, 46 Misc. Rep. 439.

Notes to section 20, "Code, Rules of Supreme Court Applicable; When."

See section 363, "*Sections of the Code not applicable.*"

Regulation.— The extension of the practice in courts of record to this court by section 20 of the Municipal Court Act was merely in-

tended to regulate the matters over which the Municipal Court has jurisdiction. *Matter of Bolte*, 97 App. Div. 551.

Judgment; execution; order of arrest.— In an action brought in this court to foreclose a lien on personal property which the defendant had maliciously and willfully disposed of, the court under section 140 of the Municipal Court Act and section 1487 of the Code of Civil Procedure, construed in connection with section 20 of the Municipal Court Act, has no power to enforce a judgment against the defendant by an execution against the person, unless an order of arrest has been issued in the action. *Liederman* v. *Rooner*, 82 App. Div. 541.

Order not appealable; levy on execution; how discharged pending defendant's appeal.— An order of a justice of this court denying a motion to vacate an order of arrest is not appealable. *Semble*, that where a defendant against whom a judgment has been recovered in this court upon which execution has been issued and levy made thereunder on his personalty files a notice of appeal and serves upon the plaintiff an undertaking in the form required by the Municipal Court Act (Laws 1902, chap. 580, § 314) for more than $100, and for twice the amount of the judgment but in an amount less than $500, the effect of the service is merely to stay further proceedings under the execution, and if the defendant desires to discharge the levy he should file a new undertaking, of similar conditions, in $500, in which event this court would, under Code Civil Procedure, section 1311, taken in connection with section 20 of the Municipal Court Act, have jurisdiction to make an order discharging the levy. *Hyman* v. *Segal*, 44 Misc. Rep. 226.

§ 25. **In what district brought.**—An action or proceeding of which the municipal court has jurisdiction must be brought:

1. In a district in which either the plaintiff or defendant or one of the plaintiffs or one of the defendants resides, unless all the plaintiffs or all the defendants reside out of the city of New York, in which case the action of* proceeding may be brought in said court in any district; provided, however, that whenever any action shall be brought by the assignee of the cause of action, such action shall upon the demand of a defendant made as provided in subdivision four of this section, be transferred to the district in which the defendant resides and the court must make an order for such transfer, as provided in subdivision four of this section.

* So in original.

(*As amended by Laws* 1904, *chap.* 93; *became a law March* 18, 1904.)

§ 25. **In what district brought.**—An action or proceeding of which the municipal court has jurisdiction must be brought:

1. In a district in which either the plaintiff or defendant or one of the plaintiffs or one of the defendants resides, unless all the plaintiffs or all the defendants reside out of the city of New York, in which case the action or proceeding may be brought in said court in any district; provided, however, that whenever any action shall be brought by the assignee of the cause of action, such action shall upon the demand of a defendant made as provided in subdivision four of this section, be transferred to the district in which the defendant resides and the court must make an order for such transfer, as provided in subdivision four of this section.

2. If the defendant be a corporation created by law, in a district in which the plaintiff or either of the plaintiffs resides, or in which (if it be a corporation) it transacts its general business or keeps an office or has an agency established for the transaction of business or is established by law, except the corporation of the city of New York, which may sue, or be sued in any district, except as provided for in subdivision five of this section.

3. By plaintiffs not residing in the city of New York, in the district in which the defendant, or one of the defendants resides, and against a defendant or defendants, not residing in said city, in the district in which the plaintiff or one of the plaintiffs resides; but where all the parties reside out of said city the action may be brought in any district. No person who shall have a place in said city for the regular transaction of business shall be deemed a nonresident under the provisions of this act.

4. If the district in which the action or proceeding is brought is not the proper district, the action may, notwithstanding, be tried therein, unless the action is transferred to the proper district before trial upon demand of the defendant

made upon or before the joinder of issue in writing or in open court, followed by the consent of the plaintiff given in like manner, or the order of the court. The demand must specify the district to which defendant requires the action to be transferred. The court must make such order when the district in which the action or proceeding is brought is not the proper district, as specified in this section or the next one, if such demand be made.

5. All actions by or on behalf of the city of New York to recover a penalty or fine for a violation of any corporation ordinance, when the amount of such penalty or fine shall not exceed five hundred dollars, must be brought in the district in which the violation of such ordinance happened or occurred. And all actions to recover a penalty or fine for a violation of any provision of the sanitary code or of any regulation of the fire commissioner or of any laws or ordinances which either the health or fire department is authorized, empowered and especially charged to enforce, where the amount of such penalty or fine shall not exceed five hundred dollars, must be brought in the district in which such violation happened or occurred. (*As amended by Laws* 1904, *chap.* 625, *passed May* 6, 1904.)

Notes to section 25.

The amendment in subdivision 1 consists of the word "or," which corrects the word "of," in Laws 1904, chapter 93.

Notes to section 25, subdivisions 2 and 3.

Nonresident plaintiff against a foreign corporation having a place of business in the city of New York.—Jurisdiction of an action brought in this court by a nonresident plaintiff against a foreign corporation having a place in said city for the regular transaction of its business is controlled by subdivision 3, and not by subdivision 2 of section 25 of the Municipal Court Act (Laws 1902, chap. 580), and under subdivision 3 is properly brought in a district of said city in which the defendant corporation has a place for the regular transaction of a portion of its business, although it has a general office for the regular transaction of its business in another district in said city. *Goldzier* v. *Central R. R. of N. J.*, 43 Misc. Rep. 667.

Notes to section 25, subdivision 5.

Construction; removal to proper district; demand; waiver.— Although *subdivision 5 of section* 25 requires an action for a penalty for a violation of an order of the department of health of the city of New York to be brought in the court district in which the violation happened, the provisions of subdivision 4 of said section, permitting the action to be tried where brought unless upon or before joinder of issue the defendant demands a transfer to the proper district, lead to the conclusion that jurisdiction is not affected by bringing the action in a district other than the one in which the violation occurred. Unless the defendant demands a transfer upon or before the joinder of issue the right of removal is lost and the judgment stands. *Department of Health* v. *Halpin*, 40 Misc. Rep. 243.

Notes to section 26, "Action; how Commenced."

Costs to defendant upon voluntary discontinuance by plaintiff; interpretation of sections 248 and 332; Municipal Court Act.— *Blum* v. *O'Conner*, N. Y. Law Journal, July 1, 1903. *Supreme Court, Appellate Term, June*, 1903. *Opinion by Freedman, P. J.* This case is not reported elsewhere. See also *Barry* v. *Winkle*, 36 Misc. Rep. 171; *Levine* v. *Hahner*, 62 App. Div. 195; *McCuskie* v. *Hendrickson*, 125 N. Y. 555.

Costs on discontinuance of summary proceedings.— Where a landlord voluntarily discontinues, before final submission, summary proceedings taken by him in the Municipal Court of the city of New York since the passage of Laws 1902 (chap. 580), the tenant is entitled as costs to his actual disbursements to the extent of $10, besides the fees of any witnesses attending from another county, and this under Code Civ. Proc., § 3076, subd. 2. *Cohen* v. *Melle*, 43 Misc. Rep. 79.

Right to discontinue on payment of costs.— A plaintiff has an absolute right to discontinue an action, brought in this court, at any time before it is finally submitted, upon payment of costs, and this although the defendant has interposed a counterclaim. The Municipal Court Act (Laws 1902, chap. 580) has made no change in this respect. *Nichols* v. *Williams*, 42 Misc. Rep. 527.

Leave refused a plaintiff where granting it might possibly give him an unfair advantage.— A plaintiff brought an action in this court for a sum greater than $250, and that action was at the instance of the defendant removed to the City Court of said city under Laws 1902 (chap. 580, § 3), upon the ground that the damages claimed exceeded $250. Afterward the plaintiff brought a second action in the Municipal Court, on the same claim, for $249, and thereafter asked of but was refused by the City Court leave to discontinue the first action on payment of costs. *Held*, that leave to discontinue the City Court action was properly refused, as the conduct of the plaintiff indicated a determination to try the case in the Municipal Court and justified

a suspicion that this determination rested upon the belief, ill founded if entertained, that the defendant would be at a greater disadvantage in that court than in the City Court. *Finklestein* v. *Meenan*, 43 Misc. Rep. 376.

Service of summons.— There is no provision in the Municipal Court Act which requires that on the service of an alias summons the original summons should also be served. The alias summons is as much a writ issued to obtain jurisdiction as the first summons. *Lawrence* v. *Bernstein*, 46 Misc. Rep. 608.

Notes to section 27, "Summons; Requisites."

"Section twenty-five of this act," in the concluding lines thereof, is an error, and should read section twenty-nine.

Fictitious name; when the judgment is fatally defective and an execution issued thereon is void.— The summons in an action brought in the Municipal Court of the city of New York was entitled as follows:

"MARY MARKOWITZ, Plaintiff, *against* ETTA LIPSKY and JOHN GOLDBERG, Defendants.	*Free summons.* *First names being fictitious, unknown to plaintiff.*"

The certificate of service recited that the marshal served the summons "on John Goldberg, one of the within-named defendants * * * and that I know the person to be one of the defendants therein named." The docket, under the title "Markowitz against Lipsky et al.," recited that the plaintiff appeared in person and that the complaint was for goods sold and delivered; that the defendant appeared in person, and that judgment was rendered for $20.25 damages and $1 costs.

The record did not show for or against whom the judgment had been rendered, or that Goldberg was a party to the action or appeared therein. An execution was then issued directing the marshal to collect the amount due out of "the separate property of the judgment debtor, John Goldberg, first name fictitious, real name unknown to plaintiff." This execution was levied upon property belonging to Nathan M. Goldberg, who was one of the persons upon whom the summons in the action was served, and who appeared in answer to the summons. In an action brought by Nathan M. Goldberg against Markowitz and the marshal who levied the execution to recover damages for the alleged conversion of the property levied upon, it was *Held*, that the record of the judgment was fatally defective, and that

the execution issued thereon was void upon its face, and constituted no protection to the marshal or to any one acting under it; that the docket did not show upon its face that any judgment had been rendered in favor of the plaintiff against the defendant; that, as Lipsky was the only defendant named in the record, there was no presumption that the proceeding was against any one but Lipsky. *Goldberg* v. *Markowitz*, 94 App. Div. 237, 238.

Section 29. **Summons: attorney-general and corporation counsel may issue, et cetera.**— In any and all actions brought in the name of the people of the state of New York by the attorney general or in the name of the city of New York, or of any department, board, or officer thereof, by the corporation counsel of the city of New York, as attorney for said city, or said department, board or officer thereof, to recover a penalty or penalties for the violation of any laws or ordinance, the summons may be issued out of said court by the attorney general or by the corporation counsel in his own name without the same being subscribed by the clerk of the court where such action or actions are brought, and in such actions the attorney general or the corporation counsel shall not be required to pay to the clerk of the court the fees in the action, but shall account therefore to the city treasurer and shall collect the same from the defendant, when judgment is recovered; and no fees or costs shall be demanded of the people of the state of New York or the attorney general or of the said the city of New York, or any board or officer thereof in any such suit or proceeding. (*As amended by Laws* 1905, *chap.* 73; *become a law March* 17, 1905.)

NOTES.

This section is the same as section 1384 of the charter, as amended by Laws 1905 (§ 125), which became a law March 31, 1905, with the exception of the omission of the word "department" before the word "board" in the last line.

Exemption as to costs upon appeal by the city.— The concluding part of section 29 of the Municipal Court Act provides that "no fees or costs shall be demanded of the city of New York, or any board or officers thereof in any such suit or proceeding." The words "any such suit or proceeding" refer to an action or proceeding to recover

a penalty for the violation of any laws or ordinance brought in the manner authorized by section 29. In the case at bar the plaintiff and appellant, upon its defeat in the court below, had the benefit of the concluding part of the sentence, and it is extremely doubtful whether the exemption as to costs covers the further aggressive proceeding by the appeal. To have the question which is presented in a number of other cases before us settled, the costs of the appeal will be imposed in the order of affirmance, and the appellant may have leave to appeal to the Appellate Division. *Health Department of the City of New York* v. *Owen*, Supreme Court, Appellate Term. Freedman, P. J., Bischoff and Blanchard, JJ., N. Y. Law Journal, December 11, 1903, reported in 42 Misc. Rep. 222, as to action to recover a penalty from a physician for failure to report facts relative to birth of a child as required by Charter, section 1237.

Notes to section 30, "Service; Alias."

Endorsement of summons. In an action to recover a penalty where the original summons contained the endorsement required by section 38, the fact that the copy alias summons served with the copy summons was not endorsed "action for a penalty, etc.," does not deprive the court of jurisdiction. *State Board of Pharmacy* v. *Jacob*, 46 Misc. Rep. 607.

Service of summons.— There is no provision in the Municipal Court Act which requires that upon the service of an alias summons, the original summons should also be served. The alias summons is as much a writ issued to obtain jurisdiction as the first summons. *Lawrence* v. *Bernstein*, 46 Misc. Rep. 608.

Notes to section 31, "Method of Service of Summons."

Original and copy summons.— There is no provision in the Municipal Court Act which requires that on the service of an alias summons the original summons should also be served. The alias summons is as much a writ issued to obtain jurisdiction as the first summons. *Lawrence* v. *Bernstein*, 46 Misc. Rep. 608.

By Laws 1905 (chap. 211), section 2881 of the Code of Civil Procedure was amended to read as follows:

§ 2881. **Service of summons, relating to express, insurance and telegraph companies.**— Where the defendant to be served is a corporation, association, partnership or person doing business in the state as an express company, an insurance company, or a telegraph company, and no person resides in the county to whom a copy of the summons may be delivered, as prescribed in the foregoing sections of this article, it may be personally served on the express company by delivering a copy thereof to any local or general agent to receive freight or, parcels, route agent, or messenger of the defendant, residing in the county, and

on any insurance company by delivering a copy thereof to any local or general agent of the defendant, residing in the county, and on any telegraph company by delivering a copy thereof to any office manager of the defendant, residing in the county; unless at least thirty days before it was issued, the defendant had filed in the office of the clerk of the county, a written instrument, designating a person residing in the county, upon whom process to be issued by a justice of the peace against the defendant may be served; in which case the summons may be personally served by delivering a copy thereof to the person so designated.

§ 2. This act shall take effect September first, nineteen hundred and five.

As section 31 of the Municipal Court Act contains the provisions for "Methods of Service" of the summons, it is doubtful if this provision of the Code will be applicable to this court.

Notes to section 32, "Order for Service of Summons; When Defendant not Found."

Substituted service of summons — Affidavit — Service of alias summons.— The failure to state in an affidavit, upon which an order for substituted service of a Municipal Court summons was granted, that no previous application for such an order had been made, is an irregularity merely and refusal of the trial justice to dismiss the complaint upon that ground does not constitute reversible error. *Lawrence* v. *Bernstein*, 46 Misc. Rep. 608. See also *Skinner* v. *Stiele*, 88 Hun, 307; *Matter of National G. Co.*, 82 App. Div. 593; *Pratt* v. *Bray*, 10 Misc. Rep. 445.

Notes to section 34, "Papers to be Filed; Proof of Service."

Substituted service; proof thereof requisite to jurisdiction.— Proof of due substituted service and a compliance with section 34 of the Municipal Court Act are essential to jurisdiction. A mere memorandum on the summons of payment of fees is not such proof of substituted service. Objection to jurisdiction on such ground may be raised at any time. *Skinner* v. *Jordan*, 46 Misc. Rep. 92.

Notes to section 36, "Who may Serve Summons."

Amending affidavit of service.— It not appearing that defendant made objection to the filing of an amended affidavit of service, the question of plaintiff's right to file it cannot be considered on appeal. *State Board of Pharmacy* v. *Jacob*, 46 Misc. Rep. 607.

Notes to section 37, "Return Day."

Judicial notice as to the time of sunrise and sunset.— The court will take judicial notice of the time of the rising or setting of the sun on

any given day, and may, where such question is material, consult the almanac, not strictly as evidence, but for the purpose of refreshing the memory of the court and jury. *Montenes* v. *Metropolitan St. R. Co.*, 77 App. Div. 493.

Notes to section 38, "Indorsement upon Summons."

Alias summons — Amending affidavit of service.— Where in an action brought in this court to recover a statutory penalty, the original summons and copy thereof had upon it the required reference to the cause of action, the fact that the copy alias summons served with the copy summons, was not endorsed "action for a penalty, etc.," as required by section 38 of the Municipal Court Act did not deprive the court of jurisdiction.

It not appearing that defendant made objection to the filing of an amended affidavit of service, the question of plaintiff's right to file it cannot be considered on appeal. *State Board of Pharmacy* v. *Jacob*, 46 Misc. Rep. 607.

Notes to section 40, "Parties; Appearance of."

Appearance by a person forbidden to practice.— The attorney for the defendant, in an action brought in this court, cannot avail himself of the objection that a person sent by him to the court on the return day of the summons, and who then entered a general appearance for the defendant, was not an admitted attorney and was forbidden to practice by section 63 of the Code of Civil Procedure. *Kerr* v. *Walter*, 104 App. Div. 45.

Costs.— Appearance by attorney is necessary to obtain costs under section 332. *Rice* v. *Hogan*, 45 Misc. Rep. 400.

Nonappearance; restoring case to calendar.— Where certain cases in this court were dismissed for nonappearance of either party within the time required, the justice had no authority to restore the causes to the calender and proceed to the trial thereof, except by defendant's express consent, or by his voluntary appearance, without objection, after service of a notice of motion on him for reinstatement. *Eichner* v. *Cohen*, 91 N. Y. Supp. 357.

§ 56. **In what cases order of arrest to be granted.**— An order to arrest the defendant must or may be granted, directed to any marshal of said city, in the following cases, but no female can be arrested except for a wilful injury to person or property:

1. In an action for the recovery of damages, in a cause of action not arising on contract, when the defendant is not a resident of the city of New York, or is about to remove there-

from, or when the action is for a wilful injury to person or property.

2. In an action for a fine or penalty, or for money or property embezzled or wrongfully misapplied or converted to his own use by a public officer, or an officer of a corporation, or an attorney, factor, broker, agent or clerk, in the course of his employment as such, or by any other person acting in a fiduciary capacity.

3. Where the defendant has been guilty of a fraud in contracting the debt, or incurring the obligation for which the action is brought, or in concealing or disposing of the property, for the taking, detention, or conversion of which the action is brought, except that no order of arrest shall be granted in an action specified in this subdivision where the debt contracted or the obligation incurred over all payments and set-offs or the property taken, obtained or converted, amounts to, or is valued at one hundred dollars, or less.

4. When the defendant has removed, concealed, or disposed of his property, or is about to do so, with the intent to defraud his creditors, except that no order shall be granted in such an action unless the plaintiff's claim or demand over all payments and set-offs exceeds one hundred dollars. (*As amended by Laws* 1903, *chap.* 156, *in effect April* 8, 1903.)

5. When an arrest is authorized by special statute, in an action for a fine or penalty, or for a wilful violation of duty.

6. When the action is for the recovery of a fine or penalty under the ordinances or by-laws of the city of New York.

Notes to section 56.

The amendments consist in adding to subdivisions 3 and 4 that no order of arrest shall be granted unless the amount of the claim exceeds $100.

Cash bail.— It stands in place of the bail — Presumed to belong to the party whose appearance it secures — Effect of his written direction to the sheriff to pay it to a third person as against his creditors. *Finelite* v. *Sonberg*, 75 App. Div. 455. See *People ex rel. Meyer* v. *Gould*, 75 App. Div. 524.

Constitutionality.— This act was held to be constitutional by the Supreme Court, Special Term, BLANCHARD, J., in *People ex rel. Arena* v. *Warden, etc.*, N. Y. Law Journal, April 21, 1903.

Body execution.— No right to, where no order of arrest had issued in action to foreclose lien on a chattel where sale was conditional. *Teitelbaum* v. *Pisatilo*, N. Y. Law Journal, February 6, 1903, Roesch, J., borough of Manhattan, fourth district.

Money deposited in lieu of bail-right of a creditor of the accused thereto where the money belongs to a third person. *People ex rel. Meyer* v. *Gould*, 75 App. Div. 524. See *Finelite* v. *Sonberg*, 75 App. Div. 455.

Sale of entire retail stock to one person; Laws 1902, chapter 528, construed.— It is doubtful whether such a sale in which so much depends upon the purchaser as required by this statute would furnish grounds for an order of arrest. It might be that the seller had done everything required upon his part, and that the purchaser had promised to do what the statute requires, and had omitted to do it, and yet the sale would be bad if the act is valid. The plaintiff having failed to prove affirmatively that the defendant did not comply with the statute in making the sale has failed to prove a cause of action necessary to support an order of arrest. *Friedland* v. *Wexler*, N. Y. Law Journal, September 14, 1903, Bennet, J., sitting in the seventh district, borough of Manhattan in August, 1903. See also *Veit* v. *Collins*, 39 Misc. Rep. 40.

Notes to section 68, "Motion to Discharge from Arrest."

Failure to issue execution in time; subsequent issue.— Plaintiff obtained an order of arrest, recovered judgment, but failed to issue execution before the expiration of twenty-four hours after he obtained the judgment, *held*, that defendant, although out on bail, is entitled to be discharged under *section* 68.

Held, also that such discharge does not defeat plaintiff's right to the subsequent issue of a body execution upon the judgment under *section* 271. *Rogow* v. *Clark*, 40 Misc. Rep. 208.

Order denying motion to vacate order of arrest is not appealable. *Leavitt* v. *Katzoff*, 43 Misc. Rep. 26; *Smith* v. *Ely*, 46 Misc. Rep. 458.

Notes to section 74, "What Must be Shown to Procure Warrant of Attachment."

Conclusions; knowledge; statements.—A warrant of attachment which states that the grounds thereof are "that defendant is a natural person and that he has departed from place where he last resided with intent to defraud his creditors and to avoid service of a summons; that he keeps himself concealed with like intent; that he has removed his property from the county of Kings, where he last resided, with intent to defraud his creditors and has secreted his property with like intent," is not defective in form. The warrant of attachment will be vacated where the affidavits on which it was issued consist almost

wholly of statements of others and of conclusions of the affiants founded thereon, and do not state on the knowledge of the affiants any facts establishing the existence of any one of the grounds stated in the warrant. *Delaney* v. *Bouse*, 91 App. Div. 437.

Sale of merchandise in bulk under Laws 1902, chapter 528; judgment by default, summons not personally served; fraud must be actual, not merely statutory, to justify an attachment.— A judgment cannot be rendered by default pursuant to section 91 of the New York Municipal Court Act (Laws 1902, chap. 580) or section 2918 of the Code of Civil Procedure, in an action where the defendant has not appeared or been personally served with the summons, but in which, however, his property has been attached, unless it appears that the affidavits upon which the warrant of attachment was issued were sufficient to authorize it.

On an application for a warrant of attachment on the ground that the defendant has disposed of his property with intent to defraud his creditors, the burden of proving the fraudulent intent is upon the party applying for the writ, and circumstances which create a strong suspicion of fraud, but yet fall short of *prima facie* proof thereof, are not sufficient. An averment in the moving affidavits that, upon a sale by the defendant of his entire stock of merchandise in bulk, the defendant and the purchaser did not do the things required by chapter 528 of the Laws of 1902, which provides that the sale of an entire stock of merchandise in bulk is fraudulent and void against the creditor of the seller, unless, at least five days before the sale, the seller and the purchaser do certain things, is insufficient to establish the violation of the statute in question, where it is evident that the averment is not based upon personal knowledge and the situation of the parties is not such as to create a presumption of knowledge and no sources of information are disclosed. *Semble*, that the fraud, which, by the Code of Civil Procedure, is made the ground for an attachment, is an actual and intentional or moral fraud, and not one which is declared to be such by statute because of the omission of certain specified formalities. *Mohlman Co.* v. *Landwehr*, 87 App. Div. 83.

Notes to section 77, "How Warrant Executed."

Additional personal property exempt in certain cases.— See amendment to Code Civil Procedure, section 1391, by Laws 1905, chapter 175, to be found under section 271, p. 101, of this supplement.

Notice to section 89, "Application to Vacate or Modify Warrant of Attachment."

An attachment against "John Doe"; effect of failure of return to excuse due service of summons.— An attachment against "John Doe" is not issued against a fictitious person and should not be vacated on the motion of the real party against whom it is issued. Where, how-

ever, there has been no personal service of the summons and the return fails to make proper excuse therefor, the defect is fatal to jurisdiction, although the return is amendable. *Sliverman* v. *Davis*, 45 Misc. Rep. 417.

Conclusions and facts.— Affidavits stating conclusions of belief, but not facts, are insufficient grounds for an attachment. *Rallings* v. *McDonald*, 76 App. Div. 112.

Attaching money deposited as bail, facts, not conclusions of belief, must be stated. *Rallings* v. *McDonald*, 76 App. Div. 112.

Irregularity.— Attachment, motion to vacate it because of a recital of "wrongful detention" instead of "wrongful conversion" is an irregularity and must be specified in the notice of motion. *Rallings* v. *McDonald*, 76 App. Div. 112.

Jurisdiction — Insufficient affidavit — Warrant not signed by plaintiff's attorney — Inquest — Insufficiency of proof.— The affidavit of plaintiff, upon which a warrant of attachment was issued, applied for upon the ground that defendant had departed from the State with intent to defraud his creditors and avoid the service of summons and kept himself concealed with like intent, did not state upon what his alleged belief that defendant had so departed, with said intent, was founded; it stated that plaintiff and his employees had made diligent effort to find defendant, but did not show in what such efforts consisted, nor what his employees were told of defendant's departure, or who told them, or who the employees were that were told. Neither the affidavits of the said employees or of the persons who informed them as to defendant's departure were furnished, nor was any reason given for not furnishing them. Held, that the affidavit was insufficient to confer jurisdiction to issue the warrant.

A warrant of attachment not signed by plaintiff's attorney as required by section 641 of the Code of Civil Procedure, is irregular and void.

Where, upon an inquest, plaintiff's proof consists merely of the contract sued upon and his conclusion that there was something due, he is not entitled to judgment. *Lassen* v. *Burt*, 46 Misc. Rep. 582.

Note.— Section 75 of the Municipal Court Act, "Contents of Warrant," contains no provision that the warrant of attachment must be signed by the attorney, nor is there any other provision in the act containing such requirement; for obvious reasons a warrant of attachment may be obtained in this court by the plaintiff personally, without an attorney, and thus there would be no attorney to sign the warrant. Section 641 of the Code of Civil Procedure has no application to this court; it applies only to courts of record where a party cannot appear personally and must have an attorney. The case of *McDonald* v. *Kieferdorf*, 18 N. Y. Supp. 763 (46 N. Y. State Rep. 176), cited as authority, arose in the late Court of Common Pleas, and is an authority for such practice in a court of record.

Notes to section 90, "Effect of Vacating Warrant," and section 91, "Judgment where Property has been Attached."

Fraud; attachment issued and summons has not been personally served; the fraud which will justify an attachment must be an actual, not a mere statutory one; what is not sufficient to establish that a sale of merchandise in bulk is void under chapter 528 of the Laws of 1902; judgment by default.— A judgment cannot be rendered by default pursuant to section 91 of the New York Municipal Court Act (Laws 1902, chap. 580) or section 2918 of the Code of Civil Procedure, in an action where the defendant has not appeared or been personally served with the summons, but in which, however, his property has been attached, unless it appears that the affidavits upon which the warrant of attachment was issued were sufficient to authorize it. On an application for a warrant of attachment on the ground that the defendant has disposed of his property with intent to defraud his creditors, the burden of proving the fraudulent intent is upon the party applying for the writ, and circumstances which create a strong suspicion of fraud, but yet fall short of *prima facie* proof thereof, are not sufficient.

An averment in the moving affidavits that, upon a sale by the defendant of his entire stock of merchandise in bulk, the defendant and the purchaser did not do the things required by chapter 528 of the Laws of 1902, which provides that the sale of an entire stock of merchandise in bulk is fraudulent and void against the creditor of the seller, unless, at least five days before the sale, the seller and the purchaser do certain things, is insufficient to establish the violation of the statute in question where it is evident that the averment is not based upon personal knowledge and the situation of the parties is not such as to create a presumption of knowledge and no sources of information are disclosed. *Semble*, that the fraud, which, by the Code of Civil Procedure, is made the ground for an attachment, is an actual and intentional or moral fraud, and not one which is declared to be such by statute because of the omission of certain specified formalities. *Mohlman Co.* v. *Landwehr*, 87 App. Div. 83.

Judgment falls, when.— Where defendant is not personally served with process and jurisdiction is sought to be obtained by procuring and levying an attachment on his personal property, if the attachment be unwarranted, a judgment rendered against defendant will fall. *Durkins* v. *Paten*, 97 App. Div. 139.

Jurisdiction.— Where an action in this court is begun by the service of a warrant of attachment without personal service of the summons, and the defendant does not appear in the action except upon a motion to vacate the attachment, which is denied, the court has no jurisdiction to render judgment against the defendant by default if the attachment should have been set aside for insufficiency. The fact that after the denial of the motion to vacate the attachment the action was dis-

missed because of the failure of either party to appear on the day set for its trial, and that the defendant subsequently consented that the case be restored to the calendar and allowed judgment to be taken against him by default, does not operate as a waiver of the defendant's right to contest the jurisdiction of the court. *Delaney* v. *Bonse*, 91 App. Div. 437.

Order vacating attachment is not appealable.— *Feldman* v. *Siegel*, 43 Misc. Rep. 392.

Notes to section 95, "Action to Recover a Chattel."

The omission of defendants to demand judgment for a return of a chattel does not preclude them from maintaining a subsequent action to regain possession of the chattel subordinate to the title of a third person. *Levy* v. *Hohweisner*, 101 App. Div. 82.

Lost property.— The finder of articles lost in a large retail dry goods store is entitled to possession thereof as against the proprietor of the store. The finder of the property is a voluntary bailee for the owner, if ever he should come forward to reclaim it, and an action of replevin will lie in favor of the finder against any person who detains possession from him. *White* v. *Daniels*, N. Y. Law Journal, January 9, 1904, JOSEPH, J., sitting in the seventh district, borough of Manhattan.

§ 115a. **Third party may interplead and defend.**— At any time before a chattel or chattels which have been replevied are actually delivered to either party, and at least two days before the return day of the summons, a person, not a party to the action, who claims a right to the possession of the chattel or chattels so replevied, or any part thereof, which right is claimed to have existed at the time when the said chattel or chattels were replevied, and which he desires to assert, may make an affidavit and deliver the same to the court, stating that he makes such claim, and does so without collusion with the defendant. The party shall also specify in such affidavit, the chattel or chattels to which he makes claim, setting forth the facts upon which his right depends. and praying to be impleaded as a defendant in the action. The court may thereupon grant leave to said party to appear and defend, and the provisions of this act in relation to the defendant or defendants originally proceeded against, so far as applicable, shall apply to the said party, and the court may, in its discretion, make such order, or direct such deliv-

ery of the possession of the property, as may be just, and thereupon the entire controversy may be determined in the action. Nothing in this section, however, shall be construed to affect the rights of the parties to maintain a separate action, or to recover damages for the wrongful taking or detention of a chattel, unless judgment is awarded against him, as herein provided, on the merits. In that case the court may grant leave to said party to appear and defend, and the provisions of this act in relation to the defendant or defendants originally proceeded against, then apply to said party. (*This section added by Laws* 1903, *chap.* 431, *in effect May* 7, 1903.)

Notes to section 115a.

See also section 187, "*Interpleader by order in certain cases.*"

Calling third party as a witness; omission to demand return of chattel. — Where the defendants set up in their answer title in a third person they may call such third person as a witness, irrespective of the fact that the third person did not avail himself of the provisions of section 115*a* of the Municipal Court Act, authorizing a third party claiming title to the chattel to interplead and defend. In such a case the omission of the defendants to demand judgment for a return of the chattel does not preclude them from maintaining a subsequent action to regain possession of the chattel subordinate to the title of the third person. Section 115*a* of the Municipal Court Act does not affect or limit section 117 of that act. *Levy* v. *Hohweisner,* 101 App. Div. 82.

Notes to section 117, "Defendant May Demand Judgment for Return of Chattel.

Omission to demand; calling third party as a witness.— Where the defendants set up in their answer title in a third person, they may call such third person as a witness irrespective of the fact that the third person did not avail himself of the provisions of section 115*a* of the Municipal Court Act, authorizing a third party claiming title to the chattel to interplead and defend. In such a case the omission of the defendants to demand judgment for a return of the chattel does not preclude them from maintaining a subsequent action to regain possession of the chattel, subordinate to the title of the third person. Section 115*a* of the Municipal Court Act does not affect or limit section 117 of that act. *Levy* v. *Hohweisner,* 101 App. Div. 82.

Notes to section 123, "Final Judgment, et cetera."

Neglect to demand return of chattels.— A final judgment rendered in favor of the defendants in an action brought in this court to replevy a chattel should not, where the chattel has been replevied by the plaintiff, and the defendants have not required a return thereof and have neglected to demand judgment for the return of the chattel as they were authorized to do by section 117 of the Municipal Court Act (Laws 1902, chap. 580), award possession of the chattels to the defendants. If the final judgment improperly awards the defendants possession of the chattel the Appellate Division has power to modify such judgment on appeal. *Levy* v. *Hohweisner*, 101 App. Div. 82.

Notes to section 126, "Action on Undertaking; when Maintainable."

Replevin.— Plaintiff permitted to recover damages though replevin suit had been abandoned. *Vera* v. *Constantine*, N. Y. Law Journal, November 24, 1902, RASQUIN, J. (second district, borough of Queens), sitting in the borough of Manhattan, second district.

Notes to section 137, "Action to foreclose a lien on a chattel, when and in what courts maintainable."

See also notes to section 1, *subdivision* 10.

Boarding-house keeper.— The lien of a boarding-house keeper (Laws 1897, chap. 418, § 71, as amended Laws 1899, chap. 380) gives him no lien on property brought upon the premises by a boarder nor any right to detain it for board where the legal rights to both the title and possession of the property were then in another, and this because the true owner cannot under the Constitution be divested of his property except by due process of law. *Barnett* v. *Walker*, 39 Misc. Rep. 323.

Parties to the foreclosure of a lien on chattels.— Where a mortgagee of chattels, removed without consent by the mortgagor, after default and demand to the premises of a storage company, sues that company in this court under section 137 to foreclose his lien, the mortgagor must be made a party defendant, as although she has lost all title and right of possession by her default, she has a right of redemption which may have a substantial value. Moreover, for the protection of other interests, she should be made a party to the end that she may be bound by the judgment. *Fishel* v. *Hamilton Storage W. Co.*, 42 Misc. Rep. 532.

Notes to section 139, "Action on Conditional Sale Agreement."

Body execution.— No right to, where no order of arrest had issued in action to foreclose a lien on a chattel where sale was conditional. *Teitelbaum* v. *Pisatilo*, N. Y. Law Journal, February 6, 1903, ROESCH, J., borough of Manhattan, fourth district.

Chattel mortgage; this section does not prevent chattel mortgagee from taking possession under mortgage; when demand necessary in conversion; mortgagee's possession under replevin not shown when judgment-roll not in evidence and defective.— In an action for conversion against a chattel mortgagee, alleged to have replevied the property in violation of section 139 of the Municipal Court Act, which provides that no action can be maintained in said court on a chattel mortgage except to foreclose the same: *held*, where the judgment-roll in the alleged action of replevin returned on appeal was only marked at trial for identification and was not put in evidence and is defective in proof of service of summons and in that no writ of replevin is attached, etc., the appellate court is bound by the record. There is nothing to show that the property was taken on replevin.

Held, further, that as the chattel mortgage gave to the mortgagee a right to enter, take away, and sell the goods, etc., there is nothing in such record to show that defendant's possession was not rightfully obtained under the mortgage. The aforesaid limitation of section 139 of the Municipal Court Act does not preclude a chattel mortgagee from taking possession according to the terms of the mortgage. If the taking of goods is lawful, it does not become unlawful without a subsequent demand for compliance with the terms of the mortgage or a demand with tender of amount due. *Shelton* v. *Holzwasser*, 46 Misc. Rep. 76.

Conversion; an action for conversion, based on a breach of a written contract for the conditional sale of personal property, will not lie.— Section 139 of the act relating to the Municipal Court of the city of New York (Laws 1902, chap. 580), which provides, "No action shall be maintained in this court, which arises on a written contract of conditional sale of personal property, where title is not to vest in the person hiring until payment of a certain sum; or a chattel mortgage made to secure the purchase price of chattels; except an action to foreclose the lien, as provided in this article," limits the jurisdiction of the court with respect to actions for a breach of a written contract for the conditional sale of personal property, and a party having such a cause of action cannot maintain an action in that court for the conversion of such property on the ground that the cause of action is for "an injury to property," within the meaning of subdivision 14 of section 1 of the act. *Samodwitz* v. *Karpf*, 80 App. Div. 496.

Household goods, et cetera, no longer excluded; repeal.— Laws 1905, chapter 503, has repealed section 115 of Laws 1897, chapter 418, as amended by Laws 1898, chapter 354, and Laws 1904, chapters 259 and 698, which excluded from conditional sales agreements certain articles such as household goods, pianos, organs, butcher's and meat market tools and fixtures, coaches, hearses, carriages, buggies, phætons, bicycles, law books, and law-office supplies, etc., etc.

Jurisdiction; when the action is upon a chattel mortgage.— In an action brought by plaintiff in this court to replevy a pool table, it appeared that he sold it to the defendant and took back a chattel mortgage for the price, and that after defendant had defaulted thereon he sold the pool table to the other defendant in the action. Section 139 provides that, "No action shall be maintained in this court which arises on * * * a chattel mortgage made to secure the purchase price of chattels; except an action to foreclose the lien, as provided in this article. For the purpose of this section an instrument in writing as above stated shall be deemed a lien on a chattel. * * *"

Held, that the action arose upon the breach of a chattel mortgage made to secure the purchase price of chattels, within the meaning of the statute, and that it was not maintainable in said court because it was not the permissible action to foreclose the lien, but was an action in which the plaintiff sought to recover as absolute owner after default. *Ginsburg* v. *De Silvestri*, 42 Misc. Rep. 530.

When an action is not upon a chattel mortgage.— This court has jurisdiction of an action brought by a chattel mortgagor against the mortgagee for selling the mortgaged chattels by mistake after receiving them back from her after default and agreeing to keep them for her until she was financially able to take them again, as such an action arises on the bailment to keep the chattels, and not on the chattel mortgage, and therefore is not within the prohibition of section 139 of the Municipal Court Act (Laws 1902, chap. 580). *Goodman* v. *Bauman*, 43 Misc. Rep. 83.

§ 140. **Judgment; order of arrest; body execution.**— In an action of foreclosure, as provided in the last section, where the sum or sums, over all payments and set-offs due and payable by the terms of a written contract of conditional sale, or upon the payment of which the title to hired personal property vests, or secured by a chattel mortgage, amount to more than one hundred dollars, the plaintiff may allege that the defendant wilfully or maliciously disposed of or concealed the property or a part thereof, covered by the instrument on which suit is instituted, in which case the court may grant an order of arrest in the manner provided in article one of this title, and upon such allegation being proved on the trial, execution against the person shall issue, if the provisions of this act relating to indorsement upon the summons have been complied with, unless the property awarded by the judgment is produced by the defendant to

satisfy the execution and levy, when made as provided in this article. Upon judgment being rendered, as prescribed in this article under the provisions of this or the last preceding section, and execution issuing thereon, the property subject to levy must be produced or possession made readily available at the time of such levy, to satisfy the execution in the manner prescribed in the judgment, and on failure so to do, where the plaintiff has recovered judgment for a sum exceeding one hundred dollars, exclusive of costs, an execution against the person shall issue, provided the provisions of this act relating to indorsement upon the summons have been complied with, on the return of the marshal having the execution made to the clerk of the court in the district in which the judgment is docketed, to the effect that such property is not available for levy and execution. (*As amended by Laws* 1903, *chap.* 156, *in effect April* 8, 1903.)

Notes to section 140.

See also notes to section 139.

Foreclosure of lien on personal property.— In an action brought in this court to foreclose a lien on personal property which the defendant had maliciously and willfully disposed of, the court, under section 140 of the Municipal Court Act and section 1487 of the Code of Civil Procedure, construed in connection with section 20 of the Municipal Court Act, has no power to enforce a judgment against the defendant by an execution against the person, unless an order of arrest has been issued in the action. *Liederman* v. *Rooner*, 82 App. Div. 541.

Instalment payments.— Action may be maintained to recover sum or sums due on a conditional sale agreement, but no order of arrest shall issue in such cases. *Section* 139, *Municipal Court Act.*

Notes to section 145, "Pleading on Joinder of Issue."

Bill of particulars.— The power of this court to order a bill of particulars is no longer governed by Code of Civil Procedure, section 2942, but by section 145 of the Municipal Court Act of 1902, which section, unlike the Code section, does not limit the time for making such an order to the time of joining issue. *Pough* v. *Cerimedo*, 44 Misc. Rep. 246.

A bill of particulars is but an amplification of the complaint and does not operate to change the nature of the cause of action set forth in such complaint. The pleadings in an action brought in this court

against a street railroad company were oral. The complaint was "for personal injuries," and, as amplified by the bill of particulars, alleged that the plaintiff on a certain day boarded a car of the defendant and tendered his fare and that the conductor refused to accept such fare, and, without cause or provocation, assaulted the plaintiff and threw him off the car, and that by reason of such misconduct the plaintiff was injured.

Held, that the cause of action was for breach of contract and was not for an assault within the meaning of *section* 1364 *of the Greater New York Charter*. *Hines* v. *Dry Dock, E. B. & B. R. R. Co.*, 75 App. Div. 391.

Costs.— A verified pleading or written notice of appearance is necessary to recover costs under section 332. *Rice* v. *Hogan*, 45 Misc. Rep. 400.

Default.— The provisions of section 145 do not necessitate a holding that issue is joined when the defendant's default is taken. The opening of the default left the parties to the action in exactly the same position which they occupied before the return day of the summons, except in so far as the opening of the default imposed conditions upon the defendant. *Levy* v. *Roossin*, 93 App. Div. 387.

Oral pleading; assumpsit; ex delicto; tort; waiver.— Where the pleadings are oral, but the return recites that the plaintiff "complained of the defendant for damages of property," and the bill of particulars reads, "Plaintiff claims damages in the sum of $150 on account of the destruction and withholding of a set of plans, drawings, etc., representing a mausoleum," the action will be deemed one in tort.

When the cause of action is *ex delicto*, the plaintiff may waive the tort and sue in assumpsit. A plaintiff who has elected to sue in tort cannot recover in assumpsit. *Bermel* v. *Harnischfeger*, 97 App. Div. 402.

When issue not joined.— Where a defendant sued in this court upon a verified complaint enters upon the return day an oral general denial, he has not joined issue within subdivision 2 of section 145 of the Municipal Court Act (Laws 1902, chap. 580), as that provision requires him to file a verified answer where the complaint is verified. *Hinrichs* v. *Interurban Street R. R. Co.*, 43 Misc. Rep. 654.

Notes to section 148, "Defendant May Offer to Allow Judgment or Compromise."

Compromise.— No advantage can be taken of offers made by way of compromise of a disputed claim. A party may, with impunity, attempt to buy his peace. *Tennent* v. *Dudley*, 144 N. Y. 504, and cases cited, reversing same case, 68 Hun, 225.

Notes to section 149, "Complaint."

Refusing to pay wages of a judgment debtor.— A complaint in an action brought under the authority of the last sentence of section 1391 of the Code of Civil Procedure, as amended by chapter 461 of the Laws of 1903, against a person or corporation refusing to honor an execution issued against the wages of a judgment debtor pursuant to that section, is demurrable if it fails to allege that no prior similar execution against the judgment debtor is outstanding.

When a statute gives a new remedy and prescribes the requisite conditions, or if an action of a certain character or against certain persons be authorized only after the performance of certain conditions, it is necessary to allege performance of these conditions.

A person seeking to maintain an action under a statute must state every fact requisite to enable the court to judge whether he has a cause of action under the statute. *Rosenstock* v. *City of New York*, 97 App. Div. 337.

Notes to section 150, "Answer; What to Contain."

An assignment cannot be attacked on the ground of fraud under a general denial. *Midler* v. *Lese*, 45 Misc. Rep. 638.

In an action upon an assigned claim for wages, the defendant may not plead that the assignment was made to secure a usurious loan. *Union C. & I. Co.* v. *Union S. Y. & M. Co.*, 46 Misc. Rep. 431.

Duress.— General allegations of duress are insufficient where there is no allegation or proof of facts constituting duress. *Harrington* v. *City of New York*, 40 Misc. Rep. 165.

Judgment for plaintiff on the pleadings, when proper.— In an action by an attorney to recover the value of professional services and disbursements, a judgment for the plaintiff on the pleadings is proper when the answer fails to deny the employment, rendition of services, their value, and the disbursements alleged to have been made. *Pierce* v. *Newlin*, 46 Misc. Rep. 122.

Negative pregnant.— An answer which simply denies in the precise language of the complaint "that in the month of April, 1904, plaintiff did work, labor, and services, etc.," constitutes a negative pregnant and must be construed to mean that plaintiff rendered the services at some time other than as alleged, and the trial justice may treat the allegations of the complaint as having been admitted. *Levin & Meyer Con. Co.* v. *Jackson*, 46 Misc. Rep. 445.

New matter; counterclaim; sections of Code of Civil Procedure made applicable.— Section 2938 of the Code of Civil Procedure, which provides that the answer interposed in an action in a Justice's Court may set forth "one or more defenses or counterclaims," must be construed in connection with section 2945 of the Code of Civil Procedure, which

makes sections 501 and 502 of such Code applicable to counterclaims interposed in actions commenced in Justices' Courts.

It was not the intention of the Legislature, when making section 2938 of the Code of Civil Procedure applicable to the Municipal Court of the city of New York and omitting to make section 2945 applicable thereto, to allow any new matter constituting a counterclaim to be set up in an answer interposed therein, but only new matter constituting a counterclaim as that term is defined in sections 501 and 502. *Lundine* v. *Callaghan*, 82 App. Div. 621.

Office address or place of business.— The defendant filed a verified answer signed "Anna K. Daniel, Defendant in person." Her office address or place of business was not added. *Held*, such omission is a mere irregularity and does not vitiate the answer or its service. *Semble*, that plaintiff could have moved to set aside the answer specifying the grounds, and the same might have then been amended without injustice to either party. *Heidenheimer* v. *Daniel*, 45 Misc. Rep. 385.

Payment is an affirmative defense; it must be pleaded.— Where the answer interposed in an action contains no plea of payment or partial payment, the defendant is not entitled to show that the plaintiff has been paid on account of his claim a greater sum than the amount which the plaintiff admits in his complaint has been paid. Payment is an affirmative defense which must be specially pleaded, and, in the absence of such a special plea, evidence thereof is not admissible under a general denial. *Rogers* v. *Simonson & Son Co.*, 45 Misc. Rep. 323.

Usury; personal defense.— In an action upon an assigned claim for wages, the defendant may not plead that the assignment was made to secure a usurious loan. *Union C. & I. Co.* v. *Union S. Y. & M. Co.*, 46 Misc. Rep. 431.

In this State a usurious contract is not void *per se*, but merely voidable at the option of the borrower or those in privity with him. *Williams* v. *Tilt*, 36 N. Y. 319; *Chapuis* v. *Mathot*, 91 Hun, 565.

Notes to section 157, "Counterclaim where Amount is in Excess of Court's Jurisdiction."

Appeal.— *Quære*, whether the objection that this court did not have jurisdiction of a counterclaim for an amount in excess of $500 can be successfully urged for the first time upon an appeal from a judgment sustaining the counterclaim. *Lifshitz* v. *McConnell*, 80 App. Div. 289.

Notes to section 158, subdivision 6, "When Defendant May Demur."

Copartnership; all the partners must be made parties defendant; the defect of parties need not be pleaded where one partner is sued and no mention is made of the copartnership; practice.— In an action to

recover the value of goods sold and delivered to a copartnership, all of the partners must be made defendants. Where such an action is brought in this court against but one of the partners, and the complaint therein makes no mention of any partnership, the failure to plead the nonjoinder of the other partners does not preclude the defendant from raising that objection on the trial. *Semble*, that in this court the defense of a nonjoinder of parties must ordinarily be raised by answer or it will be deemed to have been waived. *Sparks* v. *Fogarty*, 93 App. Div. 472.

Notes to section 165, "Exhibition of Accounts at Instance of Adverse Party May be Ordered."

Power of court; justice; examination of books.— The authority contained in section 165 of the Municipal Court Act for ordering the exhibition of a writing or account declared on is conferred upon the court and not upon a justice thereof. The section does not authorize the examination of books as by a bill of discovery. *Matter of Bolte*, 97 App. Div. 551, 552.

Notes to section 166, "Amendment of Pleadings."

Changing cause of action.— When, after a trial on a complaint for use and occupation of premises by defendant in maintaining telephone wires on the roof, the plaintiff is allowed to amend by substituting trespass as his cause of action and the case is retried after an adjournment and before a new jury upon the new issue, the allowance of such amendment is not reversible error but is in furtherance of justice. In such action the rental value of the use of the building for stringing wires is a proper measure of damages and it is for the jury to say what that fair and reasonable rental value is. *Bunke* v. *New York Telephone Co.*, 46 Misc. Rep. 97, 98.

Notes to section 170, "Pleadings to be Liberally Construed."

When judgment for plaintiff on the pleadings proper.— In an action by an attorney to recover the value of professional services and disbursements a judgment for the plaintiff on the pleadings is proper when the answer fails to deny the employment, rendition of services, their value and the disbursements alleged to have been made. *Pierce* v. *Newlin*, 46 Misc. Rep. 122.

Notes to section 171, "Immaterial Variance in Pleading to be Disregarded."

Quantum meruit and express contract.— Where the complaint in an action in this court to recover for work done and materials furnished is framed upon a *quantum meruit*, while the proof establishes the existence of an express contract, the court may, under section 2943 of

the Code of Civil Procedure, which is applicable to this court, disregard the variance, unless it is satisfied that the defendant has been misled to his prejudice thereby. *Lundine* v. *Callaghan*, 82 App. Div. 621.

Notes to section 179, "Answer of Title."

Summary removal from land of a squatter; this court is not ousted of jurisdiction by a question of title raised collaterally; the provisions of the Code of Civil Procedure as to the removal of an action where the title to real property is involved is not applicable; amendment of technical errors in pleading.— The fact that the question of title is raised collaterally, in a proceeding instituted in the Municipal Court of the city of New York under subdivision 4 of section 2232 of the Code of Civil Procedure for the summary removal of an alleged squatter from land claimed to be owned by the petitioner does not serve to oust the Municipal Court of jurisdiction.

The real issue involved in the proceeding is as to the right to the possession of the premises, and the provisions of the Code of Civil Procedure requiring the removal of an action brought in a Justice's or Municipal Court, where the determination of title to real estate is involved, have no application to such a proceeding. Where the denials contained in the answers interposed in such a proceeding are objectionable in form because of the violation of a technical rule of pleading, but are not misleading, the party interposing such an answer should be permitted to amend the same. *Van Deventer* v. *Foster*, 87 App. Div. 62.

(The law for removal of an action was repealed by Laws 1904, chap. 598.)

Notes to section 184, "Title Appearing from Plaintiff's Own Showing."

Title to real property; when it is not in question.— The fact that upon the trial of an action to recover moneys deposited by the plaintiff under a contract, by which the defendant agreed to sell to him certain real estate, it is conceded that the defendant was unable to perform the contract of sale because an adjoining building encroached upon the property contracted to be sold from two to four inches, does not bring the case within the terms of section 184 of the Municipal Court Act (Laws 1902, chap. 580) which requires the court to dismiss the complaint, where it appears upon the trial, by the plaintiff's own showing, that the title to real property is in question and that the title is disputed by the defendant. *Elinsky* v. *Berger*, 87 App. Div. 584.

Notes to section 187, "Interpleader by Order in Certain Cases."

See also section 115a, "third party may interplead and defend."

Interpleader; when permitted.— The Municipal Court Act, section 187, permits an interpleader only in an action on contract, or to recover a

chattel; hence, where a defendant has been interpleaded in an action for conversion and the original defendant is released by plaintiff, the court is ousted as to jurisdiction as to both. *Semble*, an assignment cannot be attacked on the ground of fraud under a general denial. *Midler* v. *Lese*, 45 Misc. Rep. 638.

Notes to section 194, "Adjournment Longer than Eight Days; Undertaking."

Justification of sureties.— While this section makes no provision for the justification of sureties the power to require the same is derived by this court through section 20 of this act, in accordance with section 811 of the Code of Civil Procedure and Rule 5 of the Supreme Court. *Siegel* v. *Trivers*, N. Y. Law Journal, September 14, 1903, BENNET, J., borough of Manhattan, twelfth district, sitting in the thirteenth district.

Notes to section 230, "Issue of Fact and Law; Judgment within What Time to be Rendered."

Bias or prejudice of justice.— It has been held by Mr. Justice O'Gorman in *People ex rel. Dercry* v. *Jerome* (N. Y. Law Journal of November 12, 1901), and Mr. Justice Clarke in *People ex rel. Stein* v. *Brann* (N. Y. Law Journal of December 3, 1902), that a writ of prohibition against a magistrate to prevent his trying a case because of his bias or prejudice will not lie.

Decision of another justice.— One judge cannot, upon mere motion, set aside the decision of another judge, upon allegations that the latter had erred as to any of the questions submitted to his determination. *People* v. *National Trust Co.*, 31 Hun, 26.

Duty of justice to decide case within fourteen days of its final submission; waiver.— Where the record in an action tried in this court on November 19, 1903, states, after the words, "case closed," that the case is "deemed submitted as of November 27, 1903," and there is nothing to show that either side objected thereto, the parties must be deemed to have consented to extend the time for final submission to the latter date and a decision rendered within fourteen days thereof is valid. *Bastable* v. *Cuba Supply Co.*, 43 Misc. Rep. 89.

Judgment for plaintiff on the pleadings, when proper.— In an action by an attorney to recover the value of professional services and disbursements a judgment for the plaintiff on the pleadings is proper when the answer fails to deny the employment, rendition of services, their value and the disbursements alleged to have been made. *Pierce* v. *Newlin*, 46 Misc. Rep. 122.

Jurisdiction is lost by the justice unless he files his decision within fourteen days. *Van Valis* v. *Charonca*, 40 Misc. Rep. 226. See also *Penniman* v. *La Grange*, 23 Misc. Rep. 121; *Wallace* v. *Harris*, 40 Misc. Rep. 216; *Lambert* v. *Solomon*, 28 App. Div. 562.

Reviewing decision of another justice; exception to the rule.— The rule that one justice of the Municipal Court of the city of New York cannot review the decision of another justice of that court does not apply to a case where, after the defendant's motion to open his default has been denied, as he alleges, upon affidavits surreptitiously handed to the justice by or for the plaintiff after the argument of the motion and because of the justice's misconception that the defendant had paid the judgment voluntarily, the defendant applies, without leave from that justice, for leave to reargue and for a reargument of the motion to another justice brought, within eighteen days, into the Municipal Court district by the system of rotation in the assignment of its justices, who granted a reargument and also vacated the order of the first justice denying the motion to open the default — as the motion before the incoming justice is under the circumstances to be deemed practically a separate motion made on different or additional facts. *Stromberg* v. *Di Salvo*, 38 Misc. Rep. 139. See *People* v. *National Trust Co.*, 31 Hun, 26.

Vacating this court's void judgment; the order is appealable; the appellate court is concluded by the return; it cannot consider statements in contravention thereof in the brief of counsel.— Where a justice of this court renders judgment in a case tried before him, which judgment is void because it was not rendered within the fourteen days prescribed by *section* 230 *of the Municipal Court Act* (*Laws* 1902, *chap.* 580), the justice has power, under section 254 of that act, to make an order vacating such judgment. Such order is appealable to the Appellate Division *under section* 257 of the Municipal Court Act. Upon such an appeal the court is bound by the contents of the return made by the justice, and cannot consider statements in the appellant's brief, not supported by the return, tending to show that the judgment was rendered within the statutory time. *Stern* v. *Fleck*, 102 App. Div. 272.

Notes to section 231, "Trial by Jury; Drawing the Jury."

Demand for jury trial after judgment by default has been opened is sufficient.— In an action brought by an attorney and counsellor-at-law to recover the value of professional services rendered by him to the defendant, the latter suffered judgment to be taken against him by default. Thereafter the default was opened upon the condition, among others, that an answer should be filed on or before November 6, 1903.

When this direction was made, the counsel for the defendant asked for a jury trial and offered to pay the clerk for a *venire*. The application was denied by the court. The defendant filed his answer on November 6, 1903, and renewed his motion for a jury trial and his tender, but the application was again denied. *Held*, that under section 231 of the New York Municipal Court Act (Laws 1902, chap. 580), which provides: "At any time when an issue of fact is joined, either

party may demand a trial by jury, and unless so demanded at the joining of issue, a jury trial is waived," the defendant's application for a jury trial should have been granted; that the provision of section 145 of the Municipal Court Act that issue in certain cases must be joined on the return day of the summons, except as otherwise specially prescribed in the statute, did not necessitate a holding that issue was joined in the case at bar when the defendant's default was taken; that the opening of the default left the parties to the action in exactly the same position which they occupied before the return day of the summons, except in so far as the order opening the default imposed conditions upon the defendant. *Levy* v. *Roossin*, 93 App. Div. 387.

Penalty for misconduct of officers at drawing of jurors and the formation of a jury. *See Penal Code*, § 76, *as amended by Laws* 1905, *chap.* 692.

Right and waiver of jury trial.— Where the plaintiff has demanded a jury trial and subsequently waived the jury, owing to repeated technical objections to the array interposed by the defendant such defendant is still entitled to demand a jury trial and it is reversible error for the court to deny such application and proceed with the trial if the defendant offers to pay the fee for another panel. Both parties have a right to a jury trial in said court and such trial is only waived when neither party makes a demand therefor. The plaintiff, by waiv- right. *Section* 231 of the Municipal Court Act does not require both parties to demand a jury trial in order to secure the rights of both thereto. *Sherwood* v. *New York Telephone Co.*, 46 Misc. Rep. 102.

Notes to section 233, "Trial Jurors; List of, to be Furnished Clerk of Each District."

Exemption from jury duty.— A professor or teacher in a college or academy, or an editor, editorial writer, artist, or reporter of a daily newspaper or press association regularly employed as such and not following any other vocation. *Code Civ. Proc.*, § 1030, *as amended by Laws* 1905, *chap.* 437, *to go in effect September* 1, 1905.

Also teacher in public school. *Code Civ. Proc.*, § 1081, *as amended by Laws* 1905, *chap.* 437, *to go in effect September* 1, 1905.

Also teacher in a private school. *Code Civ. Proc.*, § 1127, *subd.* 4, *as amended by Laws* 1905, *chap.* 437, *to go into effect September* 1, 1905.

Notes to section 239, "Verdict; Requisites."

Entering judgment on verdict.— The provision of section 239 of the Municipal Court Act (Laws 1902, chap. 580) that judgment "must be entered thereon (on a verdict) immediately after the rendering of the verdict," is directory merely, and a party cannot be deprived of the

benefit of his verdict by the justice's delay or refusal to render the judgment. *Lyons* v. *Gavin*, 43 Misc. Rep. 659.

Sufficiency of a verdict rendered "for the plaintiffs" but not for a specific sum.— A verdict rendered by a jury in an action tried in the Municipal Court of the city of New York to recover on four promissory notes of the same account, date, and parties and which came into the plaintiffs' possession at the same time and under the same circumstances, in the form "the jury, upon its return, renders a verdict for the plaintiffs," sufficiently conforms to the requirement of *Laws* 1902, *chapter* 580, *section* 239, that a verdict in said court "must be general for the plaintiff for a specific sum," to require the appellate court to allow it to stand where no question as to the form of the verdict was raised on the trial and where there was then no dispute as to the amount the plaintiffs were entitled to recover, if they were entitled to recover at all. *Steinhart* v. *Enteen*, 43 Misc. Rep. 388, 389.

Notes to section 240, "Conduct of Trial."

Carrier's failure to make delivery within reasonable time; when proof of notice to consignee of arrival of goods sufficient.— The clerk of the defendant carrier mailed a notice of arrival of goods to plaintiff's assignor. Such notice was returned to clerk by parties to whom it had been delivered by mistake. Said clerk immediately mailed another notice to plaintiff's assignor which was not returned. Thereafter a third notice was sent which resulted in the delivery of the goods. *Held*, judgment for plaintiff should be reversed and a new trial granted. Plaintiff was aware of the custom of carriers to give notice by mail; and the plaintiff's bookkeeper, the only witness as to lack of notice, was uncorroborated by any member of the firm of plaintiff's assignor. *Friedman* v. *Metropolitan SS. Co.*, 45 Misc. Rep. 383.

Carrier's liability for value of freight destroyed by fire; whether place of delivery is determined by address on package or that stated in bill of lading; custom not admissible to vary terms of contract.— Freight shipped by plaintiff was destroyed by fire on the defendant carrier's premises. Defendant gave testimony as to attempted delivery and that the consignee's address in the bill of lading and on the package differed.

Held, that the rights of the carrier and shipper "are controlled by a contract in writing delivered to the shipper by the carrier at the time of the receipt of the property. The admission of evidence of custom to contradict the express or implied terms of a contract is error. *Cappel* v. *Weir*, 45 Misc. Rep. 419.

Carrier's receipt for goods construed; proof necessary to establish negligence.— A bill of lading, which states that the goods were received by the carrier "in apparent good order * * * contents and condition and contents of package unknown," is no acknowledgment by the carrier that the goods were received in good condition. To charge a

carrier with negligence it is necessary to show the condition of the goods at place of shipment. Mere proof of delivery by carrier in an injured condition is not enough. *Jean, Garrison & Co.* v. *Flagg*, 45 Misc. Rep. 421.

Challenges to jurors.— § 1179, Code Civil Procedure. In an action in a court of record, or not of record, wherein a city, town, or county is a party, it is not a good cause of challenge to a trial juror, or to an officer who notified the trial jurors, that the juror or the officer is a resident of, or liable to pay taxes in the city, town, or county, which is a party to such action. (*As amended by Laws* 1903, *chap.* 294.)

Collision; when question of negligence for the jury.— Plaintiff's wagon being driven diagonally across defendant's track was struck and injured by defendant's car running in the same direction. It was shown that the driver had looked behind him before he left the curb and saw the car some distance to the rear moving at a moderate rate of speed. It was also shown that in order to cross the tracks the defendant's wagon would only have had to travel a distance of from twenty to fifty feet. There was also evidence that the motorman failed to ring a bell.

Held, under the circumstances, the question of negligence was one of fact for the jury, not one of law. *New York Bread Co.* v. *New York City R. Co.*, 46 Misc. Rep. 89.

Compromise.— No advantage can be taken of offers made by way of compromise of a disputed claim. A party may, with impunity, attempt to buy his peace. *Tennent* v. *Dudley*, 144 N. Y. 504, and cases cited; revg. S. C., 68 Hun, 225.

Counsel and judge in examination of witness.— While it is often proper and advisable for a trial judge to interrogate a witness for the purpose of making the evidence clear upon a point, as to which it has been left obscure or confused, or to bring out material facts apparently within the knowledge of the witness and overlooked by counsel, this may ordinarily be done by very few questions, and, in the main, the counsel should be left to conduct the examination. *People* v. *Haekett*, 82 App. Div. 86.

Discussion or a remark by a judge in the course of a judicial opinion should not be deemed *obiter*, when it is germane to the point under discussion, even though it may not be absolutely essential to the decision. *Miller* v. *Baltimore & Ohio R. R. Co.*, 89 App. Div. 458.

Expert witnesses; credibility of, is to be determined by the jury.— A judge presiding at a jury trial, after two duly qualified expert witnesses had testified upon the subject of the plaintiff's damages, said: "There is no use calling more witnesses like these. I do not believe them;" and directed a verdict for nominal damages for the plaintiff.

Held, that such action on the part of the court required a reversal of the judgment, as the credibility of the expert witnesses was for the jury and not for the court to pass upon. *Byerrum* v. *Springfield Breweries Co.*, 83 App. Div. 172.

Discontinuance upon payment of costs; leave refused a plaintiff where granting it might possibly give him an unfair advantage.— A plaintiff brought an action in the Municipal Court of the city of New York for a sum greater than $250 and that action was, at the instance of the defendant, removed to the City Court of said city under Laws 1902, chapter 580, section 3, upon the ground that the damages claimed exceeded $250. Afterward the plaintiff brought a second action in the Municipal Court, on the same claim, for $249, and thereafter asked of, but was refused by the City Court, leave to discontinue the first action on payment of costs. *Held*, that leave to discontinue the City Court action was properly refused as the conduct of the plaintiff indicated a determination to try the case in the Municipal Court and justified a suspicion that this determination rested upon the belief, ill-founded if entertained, that the defendant would be at greater disadvantage in that court than in the City Court. *Finkelstein* v. *Meenan*, 43 Misc. Rep. 376.

(The law for removal of an action was repealed by Laws 1904, chap. 598.)

Money had and received by defendant's agent; acceptance by plaintiff or agent's check for surplus payment, does not discharge defendant; demand.— Plaintiff's assignor, owing defendant $750, gave a check for $900 to defendant's agent and took from said agent his personal check for the balance. The agent's check being dishonored, plaintiff sued defendant. *Held*, as defendant received plaintiff's assignor's check, with knowledge that it was excessive in amount, and credited its agent with the amount stated by him to have been repaid, it is the same as if plaintiff's assignor had paid the amount to the defendant. That when the agent's check was dishonored, the demand against the defendant still subsisted; that defendant's reliance on its agent's statement that the excess was repaid was at its own risk. *Rines* v. *New York & Brooklyn Brewing Co.*, 45 Misc. Rep. 415.

Payment is an affirmative defense; it must be pleaded.— Where the answer interposed in an action contains no plea of payment or partial payment the defendant is not entitled to show that the plaintiff has been paid on account of his claim a greater sum than the amount which the plaintiff admits in his complaint has been paid. Payment is an affirmative defense which must be specially pleaded, and, in the absence of such a special plea, evidence thereof is not admissible under a general denial. *Rogers* v. *Simonson & Son Co.*, 45 Misc. Rep. 323.

Pleading as evidence.— It is not necessary to introduce a pleading in evidence as it is always before the court, and its admission binds the parties without its formal introduction as evidence. *Briggs* v. *Weeks*, 98 App. Div. 487.

Title in third person to chattel.— Where the defendants set up in their answer title in a third person, they may call such third person as a witness, irrespective of the fact that the third person did not

avail himself of the provisions of section 115*a* of the Municipal Court Act authorizing a third party claiming title to the chattel to interplead and defend. In such a case the omission of the defendants to demand judgment for a return of the chattel does not preclude them from maintaining a subsequent action to regain possession of the chattel, subordinate to the title of the third person. Section 115*a* of the Municipal Court Act does not affect or limit section 117 of that act. *Levy* v. *Hohweisner*, 101 App. Div. 82.

Summary proceedings.— Where the denials contained in the answers interposed in such a proceeding are objectionable in form because of the violation of a technical rule of pleading, but are not misleading, the party interposing such an answer should be permitted to amend the same. *Van Deventer* v. *Foster*, 87 App. Div. 62.

Value.— Where the identity of goods is lost, their agreed cost price is evidence of their value. *Goodman* v. *Bauman*, 43 Misc. Rep. 83.

Notes to section 248, "Nonsuit; when Authorized."

See also notes to sections 26, 330, *and* 332.

Costs to defendant upon voluntary discontinuance by plaintiff; interpretation of sections 248 and 332, Municipal Court Act.— *Blum* v. *O'Conner*, N. Y. Law Journal, July 1, 1903, Supreme Court, Appellate Term, June, 1903, opinion by FREEDMAN, P. J. This case is not reported elsewhere. See also *Barry* v. *Winkle*, 36 Misc. Rep. 171; *Levine* v. *Hahner*, 62 App. Div. 195; *McCuskie* v. *Hendrickson*, 125 N. Y. 555.

Costs on discontinuance of summary proceedings.— Where a landlord voluntarily discontinues before final submission summary proceedings taken by him in the Municipal Court of the city of New York since the passage of Laws 1902, chapter 580, the tenant is entitled as costs to his actual disbursements to the extent of $10 besides the fees of any witnesses attending from another county, and this under Code Civil Procedure, section 3076, subdivision 2. *Cohen* v. *Melle*, 43 Misc. Rep. 79.

Erroneous judgment.— A plaintiff who does not prove his case in this court should be nonsuited, but it is erroneous for the court to render a judgment for defendant. *The Egyptian Flag Cigarette Co.* v. *Comisky*, 40 Misc. Rep. 236.

Leave to discontinue refused a plaintiff where granting it might possibly give him an unfair advantage.— A plaintiff brought an action in this court for a sum greater than $250, and that action was, at the instance of the defendant, removed to the City Court of said city under Laws 1902, chapter 580, section 3, upon the ground that the damages claimed exceeded $250. Afterward the plaintiff brought a second action in the Municipal Court, on the same claim, for $249, and thereafter asked of, but was refused by the City Court, leave to discontinue the first action on payment of costs. *Held*, that leave to discontinue the City Court action was properly refused as the conduct of the plaintiff

indicated a determination to try the case in the Municipal Court and justified a suspicion that this determination rested upon the belief, ill-founded if entertained, that the defendant would be at greater disadvantage in that court than in the City Court. *Finkelstein* v. *Meenan*, 43 Misc. Rep. 376.

(The law for removal of an action was repealed by Laws 1904, chap. 548.)

Right to discontinue on payment of costs.— A plaintiff has an absolute right to discontinue an action, brought in this court, at any time before it is finally submitted upon payment of costs, and this although the defendant has interposed a counterclaim. The Municipal Court Act (Laws 1902, chap. 580) has made no change in this respect. *Nichols* v. *Williams*, 42 Misc. Rep. 527.

Notes to section 249, "Judgment of Dismissal on Merits; when."

Close of case.— An action in this court may be dismissed on the merits with costs where, at the close of the whole case, the court is of the opinion that the plaintiff is not entitled to recover as matter of law.

The record should, however, show that both parties had rested when the motion for a dismissal was made. *Cohen* v. *Boccuzzi*, 42 Misc. Rep. 544.

Judgment; when it is on the merits; motion to amend it; when a defendant is entitled to costs.— Where the defendant in an action to recover the contract price of certain work, which, by the terms of the contract, was to be completed on or before August 18, 1903, denies that the work has ever been completed according to the contract, and interposes a counterclaim for damages incident to the work, and the justice before whom the case was tried without a jury renders a decision "Dismissing the complaint on the ground this action is prematurely brought, the work not being completed according to the contract, and judgment for the defendant on the counterclaim for the sum of $25, without costs," such judgment operates as a dismissal of the complaint upon the merits. In such a case the defendant is entitled, under subdivisions 2 and 5 of section 332 of chapter 580 of the Laws of 1902, the Municipal Court Act, to $15 costs. *Reugamer* v. *Cieslinskie*, 104 App. Div. 135.

Notes to section 250, "Judgment; when Sum Exceeds Jurisdiction."

Jurisdiction; amount involved; remission of excess.—Where both the summons and the complaint in an action commenced in this court demand judgment for $500 and interest, a denial of a motion to dismiss the complaint upon the ground of want of jurisdiction is reversible error. The provision of section 250 of the Municipal Court Act, permitting a party to remit the excess if the sum found due "exceeds

the sum for which the court is authorized to enter judgment," applies only to cases where said court has acquired jurisdiction in the first instance. *Smith* v. *Dunn*, 46 Misc. Rep. 475.

Remitting excess.— Plaintiff sued to recover $507.33, and recovered $294.37, which included damages and costs. *Held*, it was improper to reverse the judgment because the plaintiff sued for a greater amount than $500, as he was at liberty under this section to remit the excess over $500. *Hamburger* v. *Hellman*, 103 App. Div. 263.

Notes to section 251, "Judgment where Defendant Liable to Arrest."

Execution must be issued; when; discharge.— Plaintiff obtained an order of arrest, recovered judgment, but failed to issue execution before the expiration of twenty-four hours after he obtained the judgment, *held* that defendant, although out on bail, is entitled to be discharged under *section* 68. *Held*, also, that such discharge does not defeat plaintiff's right to the subsequent issue of a body execution upon the judgment under section 271. *Rogow* v. *Clark*, 40 Misc. Rep. 208.

Notes to section 253, "Court May Open Default."

See also section 256, "*Court May Impose Conditions, etc.*"

Judgment by default is appealable.— Defendant may appeal from judgment taken against her by default, but is prohibited by section 257 from an appeal from an order opening the default. *Lang B. P. Co.* v. *Crossly*, 40 Misc. Rep. 249.

Judgment by default is not appealable.— The Municipal Court Act (Laws 1902, chap. 580) contains no provision permitting an appeal from a judgment taken by default in an action in the Municipal Court of the city of New York, and such an appeal is no longer permissible.

A defendant, who has appeared in the action, but who has defaulted in answering, who desires a review of an order denying vacation of an attachment issued in the action against his property must first have his default opened. *Brown* v. *Bouse*, 43 Misc. Rep. 72.

Jury trial may be demanded after a default has been opened. *Levy* v. *Roossin*, 93 App. Div. 387.

Order by the court.— Section 253 of the Municipal Court Act, authorizing the opening of defaults or omissions on such notice as the court may direct, contemplates an order by the court in which the default was taken. *Matter of Bolte*, 97 App. Div. 551, 552.

Restoring case to calendar.— Where certain cases in this court were dismissed for nonappearance of either party within the time required, the justice had no authority to restore the causes to the calendar and proceed to the trial thereof, except by defendant's express consent or by his voluntary appearance without objection after service of a notice of motion on him for reinstatement. *Eichner* v. *Cohen*, 91 N. Y. Supp. 357.

Reviewing decision of another justice; exception to the rule.— The rule that one justice of this court cannot review the decision of another justice does not apply to a case where, after the defendant's motion to open his default has been denied, as he alleges, upon affidavits surreptitiously handed to the justice by or for the plaintiff after the argument of the motion and because of the justice's misconception that the defendant had paid the judgment voluntarily, the defendant applies, without leave from that justice, for leave to reargue and for a reargument of the motion to another justice brought, within eighteen days, into the Municipal Court district by the system of rotation in the assignment of its justices, who granted a reargument and also vacated the order of the first justice denying the motion to open the default — as the motion before the incoming justice is under the circumstances to be deemed practically a separate motion made on different or additional facts. *Stromberg* v. *Di Salvo*, 38 Misc. Rep. 139.

Setting case down for trial.— An order opening a plaintiff's default in this court may lawfully provide that the case be set down for trial upon a day certain. *Horowitz* v. *Fuchs*, 39 Misc. Rep. 344.

Notes to section 254, "Motion to Set Aside Verdict, or Vacate, or Amend Judgment."

Costs; where a verdict is set aside as against the weight of evidence. — The question whether a judge presiding at a jury trial shall impose costs as a condition of setting aside a verdict on the ground that it is against the weight of evidence is a matter which rests in his sound discretion. *Lashaway* v. *Young*, 76 App. Div. 177.

Expiration of judge's term; successor may determine motion.— An order vacating a judgment of this court made by a justice of said court after the expiration of his term of office is a nullity. Under the provisions of section 16 of the Municipal Court Act, read in conjunction with section 254, a motion to set aside a judgment of said court and for a new trial, pending before and undecided by a justice thereof at the expiration of his term of office, may be heard and determined by his successsor in office. *Gordon* v. *Trainor*, 46 Misc. Rep. 439.

Supplementary proceedings on a judgment recovered in this court, a transcript of which was docketed in the county clerk's office; the Supreme Court may set them aside, but cannot vacate the judgment.— Where a transcript of a judgment recovered by default in the Municipal Court of the city of New York, for the borough of Brooklyn, is docketed in the office of the clerk of the county of Kings, under *section* 1369 *of the Greater New York Charter* (*Laws of* 1897, *chap.* 378) *and sections* 3017 *and* 3220 *of the Code of Civil Procedure*, and, after the return of an execution unsatisfied, supplementary proceedings are instituted thereunder, the Supreme Court is without jurisdiction to vacate the judgment on the ground that the judgment debtor had never been

served with the summons and complaint. The Supreme Court has jurisdiction, however, to stay or set aside the execution and the supplementary proceedings, as those matters flowed out of the filing of the transcript and of the docketing of the judgment. *Johnson* v. *Manning*, No. 1, 75 App. Div. 285.

Time of making motion to set aside judgment.— A motion to set aside a judgment rendered in this court dismissing the complaint, if not made at the close of the trial, must be actually made within five days from the time the judgment was rendered and upon two days' notice, and it is not a sufficient compliance with the Municipal Court Act (Laws 1902, chap. 580, § 254) that the notice of motion was given within the five days. A notice of motion is distinct from the motion itself. *Buschbaum* v. *Feldman*, 43 Misc. Rep. 85.

Vacating judgment not rendered in time.— Where a justice renders judgment in a case tried before him, which judgment is void because it was not rendered within the fourteen days prescribed by section 230 of the Municipal Court Act (Laws 1902, chap. 580), the justice has power, under section 254 of that act, to make an order vacating such judgment. Such order is appealable to the Appellate Division under section 257 of the Municipal Court Act.

Upon such an appeal the court is bound by the contents of the return made by the justice, and cannot consider statements in the appellant's brief, not supported by the return, tending to show that the judgment was rendered within the statutory time. *Stern* v. *Fleck*, 102 App. Div. 272.

Vacating judgment because material witness for defeated party did not appear on the trial.— Under Laws 1896, chapter 748, which amend section 1367 of the Consolidation Act (Laws 1882, chap. 410), and which provided that a motion to vacate or modify any judgment rendered upon a trial by the court without a jury, may be made for the causes specified in section 999 of the Code of Civil Procedure, it was held that section did not authorize the setting aside of a verdict or judgment because of the failure of one of the moving party's material witnesses to appear at the trial. *Erichsen* v. *Sidle*, 76 App. Div. 347.

Weight of evidence.— Under section 254 this court has power to set aside a verdict and grant a new trial in an action on the ground that the verdict is against the weight of evidence. *Newbound* v. *Interurban R. R. Co.*, 42 Misc. Rep. 525.

Notes to section 256, "Court May Impose Conditions, et cetera."

See also section 253, "*Court May Open Default*," *and notes.*

Jury trial may be demanded after a default has been opened. *Levy* v. *Roossin*, 93 App. Div. 387.

Security.— The order may lawfully provide that the judgment stand as security. *Long Branch Pier Co.* v. *Crossley*, 40 Misc. Rep. 249.

Notes to section 257.

(This section has no heading in the act but should be headed "What Orders are Appealable.")

Arrest.— Order denying motion to vacate order of, is not appealable. *Hyman* v. *Segal*, 44 Misc. Rep. 226.

Judgment by default is appealable.— In an action begun in this court after September 1, 1902, when the Municipal Court Act (Laws 1902, chap. 580) went into effect, the defendant may appeal from a judgment taken against her upon her default, but it is prohibited by section 257 of said statute from an appeal from an order opening her default. *Long Branch Pier Co.* v. *Crossley*, 40 Misc. Rep. 249. See also *Beebe* v. *Nassau Show Case Co.*, 41 App. Div. 456.

Judgment by default is not appealable.— The Municipal Court Act (Laws 1902, chap. 580) contains no provision permitting an appeal from a judgment taken by default in that court, and such an appeal is no longer permissible. A defendant who has appeared in the action, but who has defaulted in answering, who desires a review of an order denying vacation of an attachment issued in the action against his property must first have his default opened. *Brown* v. *Bouse*, 43 Misc. Rep. 72.

Order opening default not appealable.— The right of a person who, prior to the time when the New York Municipal Court Act (Laws 1902, chap. 580, § 257) took effect, had recovered a judgment in that court by default to appeal from an order opening the default and setting aside the judgment, was preserved by section 361 of the Municipal Court Act. Such an appeal no longer lies. The failure of the order opening the default and setting aside the judgment to recite the grounds upon which it was granted, as required by section 1367 of the Consolidation Act, constitutes a fatal defect. *Johnson* v. *Manning*, 80 App. Div. 368.

(Section 1367 of the Consolidation Act is now contained in sections 253 and 256 of the Municipal Court Act, with the exception that the order need not recite the grounds.)

In an action begun after September 1, 1902, when the Municipal Court Act (Laws 1902, chap. 580) went into effect, the defendant may appeal from a *judgment* taken against her upon her default, but is prohibited by section 257 from an appeal from an *order* opening her default. *Long Branch Pier Co.* v. *Crossley*, 40 Misc. Rep. 249.

What orders are appealable.— An order of a justice of this court denying a motion to vacate an order of arrest is not appealable, as such an order is not enumerated in the Municipal Court Act (Laws 1902, chap. 580, §§ 253, 254, 255, 256, 257).

The scope of section 20 of said act considered. *Leavitt* v. *Katzoff*, 43 Misc. Rep. 26; S. C., 86 N. Y. Supp. 495. See also *Hyman* v. *Segal*, 44 Misc. Rep. 226, and *Manelly* v. *Mayers*, 43 Misc. Rep. 380.

Order vacating judgment not rendered in time.— Where a justice renders judgment in a case tried before him, which judgment is void because it was not rendered within the fourteen days prescribed by section 230 of the Municipal Court Act (Laws 1902, chap. 580), the justice has power, under section 254 of that act, to make an order vacating such judgment. Such order is appealable to the Appellate Division (Second Department) under section 257 of the Municipal Court Act. *Stern* v. *Fleck*, 102 App. Div. 272.

§ 260. **Execution; how issued.**— An execution may be issued on a judgment of the Municipal Court at the option of the judgment creditor, either by the county clerk directed to the sheriff as prescribed by law, after the filing of a transcript of judgment, as provided in the next section, or by the clerk of the Municipal Court in the district in which the judgment was entered, within six years thereafter, directed to a marshal. But no execution shall issue out of the Municipal Court after a transcript has been issued, and no transcript shall be issued while an execution of the Municipal Court remains unreturned, except a transcript showing that a judgment has been vacated, set aside or modified. The prospective fees of the county clerk and sheriff must be omitted when an execution is issued to a marshal. (*As amended by Laws* 1903, *chap.* 144. *See notes to section* 271.)

Notes to section 261, "Transcript, how to Issue; Judgment of Supreme Court, when Docketed."

Supplementary proceedings on a judgment recovered in a Municipal Court, a transcript of which was docketed in the county clerk's office; the Supreme Court may set them aside, but cannot vacate the judgment.— Where a transcript of a judgment recovered by default in this court for the borough of Brooklyn is docketed in the office of the clerk of the county of Kings, under *section* 1369 *of the Greater New York Charter* (*Laws* 1897, *chap.* 378) *and sections* 3017 *and* 3220 *of the Code of Civil Procedure*, and, after the return of an execution unsatisfied, supplementary proceedings are instituted thereunder, the Supreme Court is without jurisdiction to vacate the judgment on the ground that the judgment debtor had never been served with the summons and complaint. The Supreme Court has jurisdiction, however, to stay or set aside the execution and the supplementary proceedings, as those

matters flowed out of the filing of the transcript and of the docketing of the judgment. *Johnson* v. *Manning*, No. 1, 75 App. Div. 285.

Notes to section 263, "Real Property Bound for Ten Years by a Judgment thus Docketed."

Lien of judgments; by Laws 1905, chapter 432, section 1251 of the Code of Civil Procedure was amended so as to read as follows:

§ 1251. Except as otherwise specially prescribed by law, and except also as in this section below provided, a judgment, hereafter rendered, which is docketed in a county clerk's office, as prescribed in this article, binds, and is a charge upon, for ten years after filing the judgment roll, and no longer, the real property and chattels real, in that county, which the judgment debtor has at the time of so docketing it, or which he acquires at any time afterwards, and within the ten years. Provided however that no judgment shall be a charge upon or bind the real property of any person unless and until he be designated by his name in a docket of such judgment in the office of the clerk in the county where such property is. Upon such notice to a judgment debtor as the court may direct the supreme court may order that any judgment heretofore or hereafter rendered therein against such debtor be amended so as to designate such debtor by his name and that the clerk of the county in which the judgment roll is filed redocket such judgment as so amended; and from the time of such redocket during the remainder of ten years from the filing of the judgment roll, such judgment shall bind and be a charge upon the real property and chattels real in that county which such judgment debtor may have at the time of such redocket or may thereafter within said ten years acquire, and a transcript of such new docket may be filed and docketed in the office of the clerk of any other county in the state in like manner and with like effect as a transcript of an original docket may be filed. Upon such notice to a judgment debtor as the court may direct any court other than the supreme court may order that, any judgment heretofore or hereafter rendered therein against such debtor and any docket thereof in such court be amended so as to designate such debtor by his name, and at any time after such amendment shall have been made a transcript of the docket of such judgment as so amended may be filed and docketed in the office of the clerk of any county in this state in like manner and with like effect as a transcript of an original docket may be filed.

Notes to section 271, "Execution; Requisites."

Additional personal property exempt in certain cases.— In addition to the exemptions, allowed by the last section, necessary household furniture, working tools and team, professional instruments, furniture and library, not exceeding in value two hundred and fifty dollars, together

with the necessary food for the team, for ninety days, are exempt from levy and sale by virtue of an execution, when owned by a person, being a householder, or having a family for which he provides, except where the execution is issued upon a judgment, recovered wholly upon one or more demands, either for work performed in the family as a domestic or for the purchase money, of one or more articles, exempt as prescribed in this or the last section. Where a judgment has been recovered wholly for necessaries sold, or work performed in a family as a domestic, or for services rendered for salary owing to an employe of the judgment debtor, and where an execution issued upon said judgment has been returned wholly or partly unsatisfied and where any wages, debts, earnings, salary, income from trust funds or profits are due and owing to the judgment debtor or shall thereafter become due and owing to him, to an amount exceeding twelve dollars per week and where no execution issued as hereafter provided for in this section is unsatisfied and outstanding against said judgment debtor, the judgment creditor may apply to the court in which said judgment was recovered or the court having jurisdiction of the same without notice to the judgment debtor, and upon satisfactory proof of such facts by affidavits or otherwise, the court, if a court not of record, a judge or justice thereof, must issue, or if a court of record, a judge or justice, must grant an order directing that an execution issue against the wages, debt,* earnings, salary, income from trust funds or profits of said judgment debtor, and on presentation of such execution by the officer to whom delivered for collection to the person or persons from whom such wages, debts, earnings, salary, income from trust funds or profits are due and owing, or may thereafter become due and owing to the judgment debtor, said execution shall become a lien and a continuing levy upon the wages, earnings, debts, salary, income from trust funds or profits due or to become due to said judgment debtor to the amount specified therein which shall not exceed ten per centum thereof, and said levy shall be a continuing levy until said execution and the expenses thereof are fully satisfied and paid or until modified as hereinafter provided. It shall be the duty of any person or corporation municipal or otherwise to whom said execution shall be presented, and who shall at such time be indebted to the judgment debtor named in such execution, or who shall become indebted to such judgment debtor in the future, and while said execution shall remain a lien upon said indebtedness to pay over to the officer presenting the same, such amount of such indebtedness as such execution shall prescribe until said execution shall be wholly satisfied and such payment shall be a bar to any action therefor by any such judgment debtor. If such person or corporation municipal or otherwise to whom said execution shall be presented shall fail, or refuse to pay over to said officer presenting said execution, the per-

*So in original.

centage of said indebtedness, he shall be liable to an action therefor by the judgment creditor named in such execution, and the amount so recovered by such judgment creditor shall be applied towards the payment of said execution. Either party may apply at any time to the court from which such execution shall issue, or to any judge or justice issuing the same, or to the county judge of the county, and in any county where there is no county judge, to any justice of the city court upon such notice to the other party as such court, judge, or justice shall direct for a modification as* said execution, and upon such hearing the said court, judge or justice may make such modification of the said execution as shall be deemed just, and such execution as so modified shall continue in full force and effect until fully paid and satisfied, or until further modified as herein provided. *Code Civ. Proc.*, § 1391, *as amended by Laws* 1905, *chap.* 175. Passed April 11, 1905, to take effect immediately.

Action for refusing to pay wages of judgment debtor.— A complaint in an action brought under the authority of the last sentence of section 1391 of the Code of Civil Procedure, as amended by chapter 461 of the Laws of 1903, against a person or corporation refusing to honor an execution issued against the wages of a judgment debtor pursuant to that section, is demurrable if it fails to allege that no prior similar execution against the judgment debtor is outstanding. *Rosenstock* v. *City of New York*, 97 App. Div. 337. See also *King* v. *Irving*, 103 App. Div. 421.

Amount to be levied upon must be stated in execution against the wages or salary of a judgment debtor.— The sheriff is not bound to accept an execution if it fails to specify a definite or the precise amount to be levied upon, and a direction to levy "to the extent of ten per centum of the debtor's salary due and owing to him from the Nassau Bank" is unwarranted. The execution is a lien on the amount of wages or salary of the debtor as it becomes periodically due, to the extent of the sum fixed by the justice, which sum is not to exceed 10 per cent. of such periodic salary or wage, and the execution to the extent of said sum so fixed is made a lien upon each successive amount of wages as it became due, said sum being subject to levy thereunder, until the whole amount of the judgment and expenses shall be paid. To render the provisions of this enactment effective, it is evident that it is necessary to have the execution specify the amount to be levied upon periodically and the words in the act "the amount specified therein" clearly relate to the amount to be fixed by the justice after considering the facts presented to him in the affidavit of the judgment debtor. Justice GREENBAUM, Supreme Court, Special Term, Part I, in *Wedelin* v. *Erlanger, Sheriff*, N. Y. Law Journal, May 23, 1905.

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* So in original.

Articles used by undertaker in business; exemption; question for jury.— Where in an action against a sheriff for seizing, upon execution, personal property in value less than $250, used in plaintiff's business as an undertaker and claimed by him to be exempt under section 1391 of the Code of Civil Procedure, of which claim the sheriff was notified before the sale, the evidence tends to support the complaint, it is for the jury to determine the character of the property, and the direction of a verdict for defendant is error. *O'Reilly* v. *Erlanger*, 46 Misc. Rep. 278. See *Clark* v. *Smith*, 31 Misc. Rep. 495; *Field* v. *Ingraham*, 15 Misc. Rep. 531; *Knapp* v. *O'Neill*, 46 Hun, 317; *Gilewicz* v. *Goldberg*, 69 App. Div. 439.

Constitutionality.— *Section* 1391, *Code of Civil Procedure*, is constitutional. *Sloane* v. *Tiffany*, 103 App. Div. 540; *King* v. *Irving*, 103 App. Div. 420.

Execution against the body; subsequent issue; construction of section 68; Code of Civil Procedure, section 572, inapplicable to this court.— Where a plaintiff, who, in October, 1902, procured an order of arrest in an action in this court and thereafter recovered judgment against the defendant, fails to take out an execution upon the judgment before the expiration of twenty-four hours after he was entitled to the judgment, the defendant, although he has given bail, is entitled to his discharge *under Laws* 1902, *chapter* 580, *section* 68. His discharge does not defeat the right of the plaintiff to the subsequent issue of a body execution upon the judgment, in the form prescribed *by Laws* 1902, *chapter* 580, *section* 271. *Code Civil Procedure, section* 572, does not apply to the Municipal Court, and, therefore, its concluding provision that "a defendant discharged as prescribed in this section shall not be arrested upon an execution issued upon the judgment in the action" has no application to the matter. *Rogow* v. *Clark*, 40 Misc. Rep. 208.

Fictitious name; when the judgment is fatally defective and an execution issued thereon is void.— The summons in an action brought in the Municipal Court of the city of New York was entitled as follows:

"MARY MARKOWITZ, Plaintiff, *against* ETTA LIPSKY and JOHN GOLDBERG, Defendant.	*Free summons.* *First names being fictitious, unknown to plaintiff."*

The certificate of service recited that the marshal served the summons "on John Goldberg, one of the within-named defendants * * * and that I know the person to be one of the defendants therein named."

The docket, under the title "Markowitz against Lipsky et al.," re-

cited that the plaintiff appeared in person and that the complaint was for goods sold and delivered; that the defendant appeared in person, and that judgment was rendered for $20.25 damages and $1 costs.

The record did not show for or against whom the judgment had been rendered, or that Goldberg was a party to the action or appeared therein. An execution was then issued directing the marshal to collect the amount due out of "the separate property of the judgment debtor, John Goldberg, first name fictitious, real name unknown to plaintiff." This execution was levied upon property belonging to Nathan M. Goldberg, who was one of the persons upon whom the summons in the action was served, and who appeared in answer to the summons.

In an action brought by Nathan M. Goldberg against Markowitz and the marshal who levied the execution to recover damages for the alleged conversion of the property levied upon, it was *held*, that the record of the judgment was fatally defective, and that the execution issued thereon was void upon its face and constituted no protection to the marshal or to any one acting under it; that the docket did not show upon its face that any judgment had been rendered in favor of the plaintiff against the defendant; that as Lipsky was the only defendant named in the record, there was no presumption that the proceeding was against any one but Lipsky. *Goldberg* v. *Markowitz*, 94 App. Div. 237, 238.

Motion for order granting leave to issue execution under section 1391, Code of Civil Procedure; parties; notice.— The application should be addressed to the court wherein judgment was recovered. The person or party who is alleged to have money or property of the judgment debtor must be made a party to the motion and must be given notice thereof as well as the judgment debtor. *King* v. *Irving*, 103 App. Div. 420–423; *Sloane* v. *Tiffany*, 103 App. Div. 540.

Policeman, salary of.— An execution against the salary of a policeman in New York city is not authorized by section 1391 of the Code of Civil Procedure. *Rosenstock* v. *City of New York*, 101 App. Div. 9.

Property rights.— The Legislature has no power to destroy existing property rights by legislation in favor of judgment creditors. *Sloane* v. *Tiffany*, 103 App. Div. 540; *King* v. *Irving*, 103 App. Div. 420.

Public servant.— It is questionable whether the salary of a public servant can be reached under Code Civil Procedure, section 1391. *Keelan* v. *Sullivan*, N. Y. Law Journal, July 19, 1905, BISCHOFF, J.

Rent due is not "necessaries sold."— The statute will not be extended to cases not clearly within the plain and ordinary meaning of its phraseology. I think the word "necessaries," as intended by the lawmakers, refers to tangible property, that is, merchandise or goods which are "necessaries" in contradistinction to such "necessaries" as rent or physician's services. If the Legislature intended to include all "necessaries" why did it add the word "sold?" If it was designed to reach a judgment debtor's wages for any "necessaries" the word

"sold" would be useless and superfluous. It must be assumed that the Legislature had a purpose in adding the word "sold," and that it intended thereby to express the popular understanding of the phrase "necessaries sold," as referring to merchandise which would be considered "necessaries" to the judgment debtor "sold" to him in contradistinction from necessaries generally speaking. Justice GREENBAUM, Supreme Court, Special Term, Part I, in *Cochran* v. *Howes*, N. Y. Law Journal, June 20, 1905.

Trust fund; will.— Section 1391 of the Code of Civil Procedure, as amended by chapter 461 of the Laws of 1903, permitting an execution upon a judgment for necessaries to be issued, and requiring the payment upon the judgment of 10 per cent. of the income of the trust fund created for the judgment debtor, is not retroactive and, consequently, does not apply to a trust created for the benefit of a judgment debtor by a will admitted to probate in 1894. The trustee is a necessary party to the motion for the execution. *King* v. *Irving*, 103 App. Div. 420; *Sloane* v. *Tiffany*, 103 App. Div. 540.

Said section of the Code of Civil Procedure would be unconstitutional if intended to affect rights acquired under trusts created and in operation before the passage of said section. *Sloane* v. *Tiffany*, 103 App. Div. 540.

Time; failure to issue execution in.— Plaintiff obtained an order of arrest, recovered judgment, but failed to issue execution before the expiration of twenty-four hours after he obtained the judgment; *held*, that defendant, though out on bail, is entitled to be discharged under *section* 68. *Held*, also, that such discharge does not defeat plaintiff's right to the subsequent issue of a body execution upon the judgment under section 271. *Rogow* v. *Clark*, 40 Misc. Rep. 208.

Notes to section 272, "Arrest (Execution)."

Failure to issue execution in time; subsequent issue.— Plaintiff obtained an order of arrest, recovered judgment, but failed to issue execution before the expiration of twenty-four hours after he obtained the judgment, *held*, that defendant, although out on bail, is entitled to be discharged under *section* 68. *Held*, also, that such discharge does not defeat plaintiff's right to the subsequent issue of a body execution upon the judgment under *section* 271. *Rogow* v. *Clark*, 40 Misc. Rep. 208.

Notes to section 276, "Marshal; when Liable to Execution; Creditor."

Action against a defendant whose name is fictitious; when the judgment is fatally defective and an execution issued thereon is void.—

The summons in an action brought in the Municipal Court of the city of New York was entitled as follows:

"MARY MARKOWITZ, Plaintiff, *against* ETTA LIPSKY AND JOHN GOLDBERG, Defendant.	*Free summons.* *First names being fictitious, unknown to plaintiff."*

The certificate of service recited that the marshal served the summons "on John Goldberg, one of the within-named defendants, * * * and that I know the person to be one of the defendants therein named."

The docket, under the title "Markowitz against Lipsky et al.," recited that the plaintiff appeared in person, and that the complaint was for goods sold and delivered; that the defendant appeared in person, and that judgment was rendered for $20.25 damages and $1 costs.

The record did not show for or against whom the judgment had been rendered, or that Goldberg was a party to the action or appeared therein. An execution was then issued directing the marshal to collect the amount due out of "the separate property of the judgment debtor, John Goldberg, first name fictitious, real name unknown to plaintiff". This execution was levied upon property belonging to Nathan M. Goldberg, who was one of the persons upon whom the summons in the action was served, and who appeared in answer to the summons.

In an action brought by Nathan M. Goldberg against Markowitz and the marshal who levied the execution, to recover damages for the alleged conversion of the property levied upon, it was *held*, that the record of the judgment was fatally defective, and that the execution issued thereon was void upon its face and constituted no protection to the marshal or to any one acting under it;

That the docket did not show upon its face that any judgment had been rendered in favor of the plaintiff against the defendant. That as Lipsky was the only defendant named in the record, there was no presumption that the proceeding was against any one but Lipsky. *Goldberg* v. *Markowitz*, 94 App. Div. 237, 238.

§ 282. **Duties of the clerk.**— 9. To keep his office open for the transaction of business, every judicial day, from nine o'clock in the forenoon to four o'clock in the afternoon, except that during the months of July and August of each year the clerk's office may, by a rule established by the board of justices, be closed at two o'clock in the afternoon. (*As*

amended by Laws 1904, *chap.* 682; *passed May* 9, 1904, *adding subd.* 9 *to this section.*)

Notes to section 295, "Prosecution of" [Marshal's] "Bond."

Action against the surety upon a marshal's bond; a judgment against him is not even prima facie evidence of a breach; what is necessary proof to obtain judgment against surety.— In an action against the surety upon the official bond of a marshal, conditioned that he shall well and faithfully execute the duties of his office without fraud, deceit, or oppression, a judgment recovered against him for a conversion or unlawful levy is not, as against the surety, even *prima facie* evidence of the facts essential to a recovery. While section 295 of the Municipal Court Act makes it a condition of maintaining such an action against the surety that a judgment shall have been recovered against the marshal, execution issued and returned wholly or partly unsatisfied and leave given to prosecute the bond, the act does not declare that the judgment shall be evidence against the surety or anything more than the fact that the judgment has been obtained. *Loewer's Gambrinus B. Co.* v. *Lithauer*, 43 Misc. Rep. 683.

Invalid levy on goods of a third person; bond of a city marshal of Brooklyn; its validity.— A surety, of a marshal of the former city of Brooklyn, which has become bound for his faithful discharge of the duties of his office and in default thereof to pay all damages resulting from such default, is liable to a person where the marshal attaches and sells that person's property by virtue of process running against another person. The marshal must be deemed to have been acting *colore officii*. The validity of the bond is not impaired by the facts that it was given before, while the breach thereunder arose after, January 1, 1898, when the said charter took effect. *Fohs* v. *Rain*, 39 Misc. Rep. 316.

Liability for wrongful levy.—A city marshal and the sureties upon his official bond "for the faithful discharge of his duties" are liable in damages for a levy upon the goods of one person under an execution or other process against the goods of another. *Frankenstein* v. *Cummisky*, 46 Misc. Rep. 485.

Notes to section 296, "In What Court Bond May be Prosecuted."

County Court of Kings county.— The bond may be ordered prosecuted against the surety and the marshal continued in office by the charter of the city of New York, in the Municipal Court of said city, borough of Brooklyn, and the said charter (*Laws* 1897, *chap.* 378, § 1428) does not limit prosecution to the County Court of Kings county. *Fohs* v. *Rain*, 39 Misc. Rep. 316.

Jurisdiction in an action against a foreign corporation, having an office in said city, as surety upon a city marshal's bond.— The jurisdiction of the Municipal Court of the city of New York to render judgment against a foreign corporation, having an office in said city, and being surety on the bond of a city marshal, is to be determined by the Municipal Court Act (Laws 1902, chap. 580, § 1, subds. 5 and 18), and under these subdivisions, when read together, there is no jurisdiction where the plaintiff claims more than $500. Section 296 of said act, authorizing a justice of the Supreme Court to order prosecution in the said Municipal Court of a marshal's bond — without limitation as to its amount — cannot aid the plaintiff, and is to be condemned as an attempt to give such a justice power to confer upon the said Municipal Court jurisdiction in such a case beyond $500. *Frieland* v. *Union Surety Co.*, 43 Misc. Rep. 38.

§ 306. **Removal and suspension of marshals.**— The mayor may remove any marshal, after giving him an opportunity to be heard, upon charges in writing preferred against such marshal, and filed with the mayor, and may, in his discretion, suspend said marshal from the performance of his duties, as such, pending a hearing upon the charges. Upon charges being preferred against a marshal by a justice of the municipal court, the mayor may forthwith cause notice of suspension of such marshal to be served upon him, and such marshal shall thereupon remain suspended until the hearing and determination of such charges by the mayor. The mayor may, in his discretion, delegate to the secretary to the mayor the power and duty of hearing the evidence to be produced upon the said hearing and in such case the said secretary to the mayor shall have the power to issue subpœnas, administer oaths and take such evidence and shall submit the same to the mayor who shall thereupon make a determination thereon, which determination shall have the same force and effect as if the said evidence had been taken before the mayor. (*As amended by Laws* 1904, *chap.* 264; *passed April* 8, 1904.)

§ 307. **Payment of money received by marshals.**— Whenever any marshal shall collect or receive any money upon any process of the municipal court of the city of New York, he shall pay the same over to the clerk of the court of the dis-

trict from which such process was issued, less his lawful fees and disbursements within five days after the same shall have been received by him. Upon his failure so to do he may be proceeded against as for a contempt. The clerk of the court with whom such money is deposited shall pay the same over on demand to the person entitled thereto. (*This is a new section added by Laws* 1905, *chap.* 228; *became a law April* 19, 1905.)

§ 311. An appeal must be taken within twenty days after the entry of the judgment, order or final order in the docket, except that where a defendant appeals from a judgment rendered in an action wherein he did not appear and the summons was not personally served upon him, the appeal may be taken within twenty days after personal service upon him, on the part of the plaintiff, of written notice of the entry of the judgment. An appeal is taken by serving upon the clerk of the court or his successor in office in the district in which the judgment, order or final order was rendered, and upon the respondent, a written notice of appeal, subscribed either by the appellant or by his attorney in the appellate court, and paying at the same time the costs and disbursements of the action to such clerk who shall hold the same to abide the event of such appeal and the further order of the court in the district from which the appeal was taken. (*As amended by Laws* 1904, *chap.* 598; *passed May* 4, 1904.)

Notes to section 310, "When Appeal May be Taken," and section 311, "When and how Taken."

RULES FOR THE HEARING OF APPEALS FROM THE CITY COURT OF THE CITY OF NEW YORK AND FROM THE MUNICIPAL COURT IN THE BOROUGHS OF MANHATTAN AND THE BRONX.

Rule I.

There shall be a term of the Supreme Court for the hearing of appeals from the City Court and the Municipal Court of the city of New York in the boroughs of Manhattan and the Bronx, which shall commence on the first Monday of October, November, December, January, February, March, April, May, and June in each year, at 10:30 A. M., and shall continue from day to day during each of said months

until all appeals ready for hearing are heard and disposed of. The court shall hold its sessions in the court-house in the county of New York, and it shall be held by three justices of the Supreme Court duly designated to hold such term, and shall be known as the Appellate Term.

Rule II.

The clerk of such term of the Supreme Court shall make up a calendar of all appeals to be heard at each term, and publish the same in "The Law Journal" at least five days before the commencement of the term. No appeal shall be placed on such calendar unless the return from the court below is duly filed with the clerk of such term at least eight days before the commencement of the term; nor, in the case of appeals from the City Court, unless an affidavit is filed with such clerk at least eight days before the commencement of the term, by which it appears that three copies of such return, duly printed as required by the General Rules of Practice, have been served upon the attorney for the respondent. Upon such return being filed as aforesaid, and, in the case of appeals from the City Court, upon an affidavit as aforesaid being also filed, the clerk shall place the appeal upon the calendar in the order in which the return was filed. Upon an appeal from the City Court the judgment or order of the court shall be entered in the office of the clerk of the Supreme Court; a certified copy of such judgment or order shall be annexed to the return from the City Court, which certified copy and return shall be transmitted to the City Court as required by section 1345 of the Code of Civil Procedure. Upon an appeal from the Municipal Court the judgment or order of the Appellate Term shall be entered in the office of the clerk of the Supreme Court, and a certified copy thereof annexed to the return received from the Municipal Court, which return and certified copy of the judgment or order shall be returned to the district of the Municipal Court from which the appeal was taken, as provided by section 317 of chapter 580 of the Laws of 1902, which shall remain on file in the said Municipal Court.

Rule III.

In appeals from the City Court, in case the appellant does not cause the return to be filed with the clerk of the said Appellate Term, and print and serve three copies thereof upon the attorney for the respondent, as required by the General Rules of Practice, within ten days after the settlement of the case on appeal, the respondent may move, upon five days' notice, on the first day of the term of such court to dismiss the appeal, and the appeal shall be dismissed, unless the time of the appellant to cause such return to be filed and copies thereof to be printed and served be extended by the justices assigned to hear such appeals, or one of them, for good cause shown. In

appeals from the Municipal Court of the city of New York, if the appellant does not procure the return to be made to the court within the time prescribed by section 317 of chapter 580 of the Laws of 1902, the respondent may move, on five days' notice, to dismiss the appeal, and such appeal shall be dismissed, unless the justices assigned to hear such appeal, or one of them, for good cause shown, shall extend the time. If the court below shall not make the return as prescribed by section 317 of chapter 580 of the Laws of 1902, either party may move at the Appellate Term, upon five days' notice to the attorney for the adverse party and to the trial justice to compel such return by attachment.

Rule IV.

Motions for reargument will only be heard on notice to the adverse party at the next succeeding term after the decision; such notice must state briefly the ground upon which the reargument is asked, and such motions must be submitted on printed briefs stating concisely the points supposed to have been overlooked or misapprehended by the court with proper reference to the particular portion of the case and the authorities relied upon, together with copies of the opinions, if any, and counsel will not be heard orally.

Rule V.

In the argument of the appeal from an order or from a Municipal Court judgment, not more than fifteen minutes shall be occupied by counsel on either side, and in the argument of an appeal from a judgment of the City Court not more than thirty minutes shall be occupied by counsel on either side, except by express permission of the court.

Rule VI.

If the appellant does not appear upon the call of the calendar, the judgment or order appealed from shall be affirmed. If the appellant appears and the respondent fails to appear, the appellant may either argue or submit his case, but judgment of reversal by default will not be allowed.

Rule VII.

An application to appeal to the Appellate Division of the Supreme Court from a determination of the Appellate Term, under section 1344 of the Code of Civil Procedure, must be made in writing on notice to the adverse party upon the first day of the term following the term in which the case was decided; and such application must set forth in full the special reasons why such an appeal should be allowed, and must be submitted without oral argument.

Rule VIII.

All motions which may be made under Rule III upon a notice of five days.— Proof of service of such notice must be filed with the clerk, together with a note of issue, on the Friday preceding the commencement of the term. In all other cases, whether the motion be founded upon regular notice or an order to show cause, proof of service of the notice or order, together with a note of issue, must be filed with the clerk on the same day.

The Motion Calendar will be published on the Saturday preceding the commencement of the term, but no motion will be placed thereon except upon compliance with this rule.

Appeals from the Municipal Court will be disposed of in their order upon the calendar. If either party be not ready to argue the case orally when called for argument, he must submit, or the case for cause shown be ordered to stand over until the next term.

Proposed orders must be presented for settlement on a notice of two days.

Every order containing a provision for a new trial in the Municipal Court must specify the time and place of the new trial ordered in accordance with the provisions of section 3065 of the Code of Civil Procedure.

Supreme Court — Appellate Term.

In all motions which are required to be placed upon the Motion Calendar under Rule VIII of the rules for the hearing of appeals from the City Court and from the Municipal Court, and in motions for restitution, no oral argument will be heard and the Motion Calendar will not be called.

The papers upon which a motion is made and the answering affidavits must be filed with the clerk of the Appellate Term at or before 12 o'clock noon of the day for which the motion is noticed.

If a motion affects any appeal on the calendar, counsel are requested to call the attention of the clerk to the fact.

Appeals from orders and judgments of the City Court will be heard in the forenoon of the first day of the term.

Appeals from the Municipal Court will be heard in the afternoon of the same day, after the Calendar of City Court Appeals shall have been disposed of.

On appeals from the City Court no typewritten copies of the points will be received and the body of each point in the printed copies must be in uniform type, as prescribed by Rule 43 of the General Rules of Practice.

No appeal from a judgment or order of the Municipal Court will be heard or received on submission unless proof of service of a notice of argument shall have been filed with the clerk of the Appellate Term not less than six days before the first day of the term.

Amended Rules Appellate Division, Second Department, Regulating Appeals from the Municipal Court.

All appeals from judgments rendered in the Municipal Court of the city of New York, in districts embraced within the Second Judicial Department, will be heard by the Appellate Division of the Supreme Court for said department. No special calendar of such appeals will hereafter be made up, but they will be placed upon the general calendar of enumerated cases, according to the date of the appeal, and will be treated in all respects, not herein specially provided for, like other appeals to the Appellate Division from courts other than the Supreme Court. Either party may bring such an appeal on for hearing by a notice of argument served at least eight days prior to the beginning of the term. Upon the return day of said notice the respondent may, upon the default of his adversary, take a judgment of affirmance or an order dismissing the appeal, as the justice of the case may require; and it shall not be necessary to make a special motion for the dismissal of an appeal, except for failure to file the return. In case of a failure of any justice of the Municipal Court to make return to this court, as required by section 317 of chapter 580, Laws of 1902, it shall be the duty of the appellant forthwith to apply to this court, under the provisions of sections 3055 and 3056 to compel such return.

The appeal shall be heard upon the original return or a certified copy thereof, and each party shall file five copies of any brief or points which he may desire to submit, at least one day before the argument.

These amended rules will take effect beginning with the February term, 1905.

Affidavits attached to the appellant's brief not considered.— On an appeal from an order of this court the Appellate Division will not consider affidavits attached to the appellant's brief. *Guase* v. *Sterling Piano Co.*, 95 App. Div. 115.

Corrected judgment.— Where a judgment for defendant is, on plaintiff's motion, corrected to read "complaint dismissed for failure of proof," the plaintiff cannot subsequently appeal from such corrected judgment as it was made on her own motion and enables her to begin another action for the same cause. *Reichenberg* v. *Interurban St. R. R. Co.*, 45 Misc. Rep. 387.

Delay in deciding, in the second department, appeals from the New York Municipal Court, explained.— The delay of the Appellate Division in the second department, in disposing of appeals, involving questions of fact, from judgments of the Municipal Court of the city of New York, declared to be due to the fact that the appellate court is provided with but a single copy of the appeal papers, thus preventing all the members of the court from working upon the case at the same time. *Schmand* v. *Langdon*, 89 App. Div. 191.

Exceptions to be heard in the first instance; power of Appellate Term and Appellate Division; history.— The Appellate Term of the City and District Courts of the city of New York, as constituted under the rules of the Appellate Division, has no power to pass upon exceptions ordered to be heard in the first instance, during the suspension of entry of judgment dismissing a complaint. The power of said Appellate Term relates exclusively to appeals, and a motion for a new trial, ordered to be heard in the first instance, is not an appeal.

The power of the Appellate Division to pass upon such exceptions in the first instance is exclusive. *History of Appellate Term and its jurisdiction stated. Dickson* v. *Manhattan R. Co.*, 45 Misc. Rep. 572. *Decided December Term*, 1904.

Judgment by default is appealable.— In an action begun in this court after September 1, 1902, when the Municipal Court Act (Laws 1902, chap. 580) went into effect, the defendant may appeal from a judgment taken against her upon her default, but it is prohibited by section 257 of said statute from an appeal from an order opening her default. *Long Branch Pier Co.* v. *Crossley*, 40 Misc. Rep. 249. See also *Beebe* v. *Nassau Show-Case Co.*, 41 App. Div. 456.

Judgment by default not appealable.— The Municipal Court Act (Laws 1902, chap. 580) contains no provision permitting an appeal from a judgment taken by default in that court, and such an appeal is no longer permissible. A defendant who has appeared in the action, but who has defaulted in answering, who desires a review of an order denying vacation of an attachment issued in the action against his property must first have his default opened. *Brown* v. *Bouse*, 43 Misc. Rep. 72.

Jurisdiction; counterclaim $500.— *Quære*, whether the objection that this court did not have jurisdiction of a counterclaim for an amount in excess of $500 can be successfully urged for the first time upon an appeal from a judgment sustaining the counterclaim. *Lifshitz* v. *McConnell*, 80 App. Div. 289.

Orders.— Only such orders are appealable as are enumerated in sections 253, 254, 255, and 257 of this act. *Smith* v. *Ely*, 46 App. Div. 458, citing *Leavitt* v. *Katzoff*, 43 Misc. Rep. 26.

Orders appealable; levy on execution, how discharged pending defendant's appeal.— An order of a justice of this court denying a motion to vacate an order of arrest is not appealable. *Semble*, that where a defendant against whom a judgment has been recovered in this court upon which execution has been issued and levy made thereunder on his personalty files a notice of appeal and serves upon the plaintiff an undertaking in the form required by the Municipal Court Act (Laws 1902, chap. 580, § 314) for more than $100 and for twice the amount of the judgment but in an amount less than $500, the effect of the service is merely to stay further proceedings under the execution, and if the defendant desires to discharge the levy he should file a new

undertaking of similar conditions in $500, in which event this court would under Code Civil Procedure, section 1311, taken in connection with section 20 of the Municipal Court Act, have jurisdiction to make an order discharging the levy. *Hyman* v. *Segal*, 44 Misc. Rep. 226.

Order opening a default not appealable.— The right of a person who, prior to the time when the New York Municipal Court Act (Laws 1902, chap. 580, § 257) took effect, had recovered a judgment in that court by default to appeal from an order opening the default and setting aside the judgment, was preserved by section 361 of the Municipal Court Act. Such an appeal no longer lies. The failure of the order opening the default and setting aside the judgment to recite the grounds upon which it was granted, as required by section 1367 of the Consolidation Act, constitutes a fatal defect. *Johnson* v. *Manning*, 80 App. Div. 368.

Order sustaining a demurrer.— No appeal lies to this court from an order sustaining or overruling a demurrer to a complaint. But where, though the notice of appeal recites the entry of a judgment, the record does not contain a judgment entered upon such an order, an appeal therefrom will be dismissed. *Smith* v. *Ely*, 46 Misc. Rep. 458.

Pleading minutes of trial.— As a general rule the scope of an adjudication in this court may, in view of the informality of the pleadings and proceedings in that court, be determined by a resort to the minutes of the trial. Section 1209 of the Code of Civil Procedure does not apply to this court and the question whether a judgment rendered by it dismissing the complaint was or was not rendered upon the merits need not therefore be determined on the judgment-roll alone, but resort may be had to the minutes of the trial. *Stecher* v. *Independent Order*, 45 Misc. Rep. 340.

Retaxation of costs; the remedy is by an appeal from the judgment in which such costs are included; second department.— The jurisdiction of the Appellate Division in the second department to review orders of the Municipal Court of the city of New York is statutory only.

The Municipal Court Act (Laws 1902, chap. 580, §§ 253–257) does not permit an appeal to the Appellate Division in the second department from an order of the Municipal Court of the city of New York denying a motion to review a taxation of costs under an order made by such Appellate Division affirming a judgment of the Municipal Court.

The appeal contemplated in section 342 of the Municipal Court Act relating to the review of a taxation of costs is an appeal from the judgment and not an appeal from the separate order reviewing the taxation. *Semble*, that as it is the practice in the Municipal Court, after the affirmance of a judgment by the Appellate Division, to enter a new judgment containing the costs upon appeal, the remedy of the party claiming that an excessive amount of costs was allowed is to appeal to the Appellate Division from so much of the judgment as awards the item which he deems to be excessive. *Spiegelman* v. *Union Railway Co.*, 95 App. Div. 92.

Vacating its own void judgment; the order is appealable; the appellate court is concluded by the return; it cannot consider statements in contravention thereof in the brief of counsel.— Where a justice of this court renders judgment in a case tried before him, which judgment is void because it was not rendered within the fourteen days prescribed by *section* 230 *of the Municipal Court Act* (*Laws* 1902, *chap.* 580), the justice has power under section 254 of that act to make an order vacating such judgment. Such order is appealable to the Appellate Division, second department, *under section* 257 of the Municipal Court Act. *Stern* v. *Fleck*, 102 App. Div. 272.

Return and statements of brief.— Upon an appeal the court is bound by the contents of the return made by the justice, and cannot consider statements in the appellant's brief, not supported by the return, tending to show that the judgment was rendered within the statutory time. *Stern* v. *Fleck*, 102 App. Div. 272.

Statutory.— The power of the Supreme Court to entertain appeals from this court is purely statutory. *Smith* v. *Ely*, 46 Misc. Rep. 458, citing *Leavitt* v. *Katzoff*, 43 Misc. Rep. 26.

Notes to section 317, "Return."

A marshal's return showing personal service of the summons and verified complaint upon the defendant cannot be controverted by affidavit that she was not served and her affidavit forms no part of the record. *Long Branch Pier Co.* v. *Crossley*, 40 Misc. Rep. 249.

Notes to section 318, "Settlement of Case on Appeal."

Waiver.— Service by the respondent of amendments to the case on appeal is a waiver of any defects in the appellant's procedure. *Cooley* v. *Penn. R. R. Co.*, 40 Misc. Rep. 238.

Notes to section 326, "Judgment."

Erroneous transfer of action; appeal from order.— Where it appears that an action, transferred to a district not adjoining, because of the disqualification of the justice, was brought in the proper district and no appeal is taken from an order denying defendant's motion to further transfer the cause, not to the district adjoining the one in which the action had been brought, but to the district in which defendant resided, the objection that the district to which the transfer was made did not adjoin the district in which the action was brought was waived and could not be raised for the first time on appeal from a judgment in favor of plaintiff. *Lesser* v. *Adolph*, 46 Misc. Rep. 265.

Proof of damages for personal injuries; judgment not reversed if the damages are warranted by undisputed testimony; effect of failure to make timely objection.— In an action for damages for personal injuries, where the damages recovered were $200 and the injuries sustained by

the plaintiff were severe and required the services of a physician for several days, for which services the bill was $40, such damage may have been based wholly on the testimony as to plaintiff's injuries and the consequent pain and suffering and the value of medical services. Hence, although in plaintiff's testimony as to his weekly earnings he included the profits of three men employed by him as painters, the judgment should not be reversed for the sole reason that there is a possibility that the judgment comprehended a minute portion of said profits. To do so would be to thwart justice and offer a premium on appeals. An objection to plaintiff's testimony that his average earnings were $21 a week on the ground that such answer is "speculative and remote" is not well taken, nor is it made in time when taken after the testimony is in. *Tanzer* v. *New York City Ry. Co.*, 46 Misc. Rep. 86.

Sufficiency of testimony; erroneous rulings.— Where in an action to recover the amount deposited upon the making of an oral contract for the sale of certain real estate, the evidence, though conflicting, is sufficient to establish the falsity of defendant's statement in relation to the dimensions of the property, this court under this section will not disturb a judgment for plaintiff because of erroneous rulings in the admission or exclusion of testimony, particularly in relation to the ownership of the property. *Lesser* v. *Adolph*, 46 Misc. Rep. 265.

Notes to section 330, "When Prevailing Party Entitled to Recover Costs."

See notes to section 332, "Costs, sums allowed." Notes to section 26, "Action, how commenced." Notes to section 248, "Nonsuit, when authorized."

Notes to section 332, "Costs; Sums Allowed."

Costs to defendant upon voluntary discontinuance by plaintiff; interpretation of sections 248 and 332, Municipal Court Act.— *Blum* v. *O'Connor*, N. Y. Law Journal, July 1, 1903, Supreme Court, Appellate Term, June, 1903, opinion by FREEDMAN, P. J. This case is not reported elsewhere. See also *Barry* v. *Winkle*, 36 Misc. Rep. 171; *Levine* v. *Hahner*, 62 App. Div. 195; *McCuskie* v. *Hendrickson*, 125 N. Y. 555.

Judgment when it is on the merits; motion to amend it; when a defendant is entitled to costs.— Where the defendant in an action to recover the contract price of certain work which, by the terms of the contract, was to be completed on or before August 19, 1903, denies that the work has ever been completed according to the contract, and interposes a counterclaim for damages incident to the work, and the justice before whom the case was tried without a jury renders a decision "dismissing the complaint on the ground this action is prematurely brought, the work not being completed according to the contract, and

judgment for the defendant on the counterclaim for the sum of $25.00 without costs," such judgment operates as a dismissal of the complaint upon the merits. In such a case the defendant is entitled, under subdivisions 2 and 5 of section 332 of chapter 580 of the Laws of 1902 (The Municipal Court Act), to $15 costs. *Reugamer* v. *Cieslinskie*, 104 App. Div. 135.

What necessary to recover costs.— The only appearance of defendant being by an indorsement on the summons he is not entitled to costs under this section. A verified pleading or a written notice of appearance by an attorney-at-law is absolutely necessary to such costs. *Rice* v. *Hogan*, 45 Misc. Rep. 400.

§ 341. **Taxation of costs.**— Where judgment has been rendered by the justice, costs must be taxed by the clerk and inserted in the judgment. Before any item of costs other than the costs fixed by the express provision of law or granted by the justice or fees paid to the clerk in the action are allowed, the party must show by his affidavit, or that of his attorney, that the item was actually and legally paid and incurred. All items of cost must be entered by the clerk in the docket book kept by him. The clerk shall likewise tax costs allowed by the appellate court, and the prospective fees of the county clerk and sheriff, namely a charge for docketing judgment and issuing an execution, and for receiving and returning one execution thereof. (*As amended by Laws* 1903, *chap.* 144.)

Notes to section 341.

Costs of appeal to be taxed by clerk of this court; no time limit; judgment for same; mandamus.— This is a motion for a writ of peremptory mandamus to direct a clerk of the Municipal Court of the city of New York to tax a bill of costs. The clerk has refused to do so, in the face of the objection of opposing counsel that the taxation of the bill was noticed more than twenty days after the docketing of the judgment of the Municipal Court and after the defendant had appealed from that judgment. It appears that a judgment was entered in the Municipal Court, from which plaintiff appealed to the Appellate Term. The Appellate Term reversed the judgment, with costs to the appellant to abide the event. The second trial was had and judgment awarded the plaintiff, with costs. The bill of costs sought to be taxed represents the costs resulting from the reversal of the first judgment by the Appellate Term and accruing to the plaintiff by reason of his success upon the second trial. I see no occasion for their insertion in

the judgment docketed in the Municipal Court as a result of the second trial nor any necessity for their taxation within twenty days after the rendition of the judgment of the trial justice. Section 341 of the Municipal Court Act (chap. 580, Laws of 1902) provides that "the clerk shall likewise tax costs of the appellate court." The costs here sought to be taxed are such costs. No time limit is fixed, nor is there any provision in the statute that the same shall be inserted in the judgment resulting from the second trial. The clerk should have taxed the costs and entered judgment for the amount thereof. The motion is granted, with $10 costs. *Kroder* v. *Mangin*, N. Y. Law Journal, June 4, 1903, Supreme Court, Special Term, BLANCHARD, J.

Notes to section 342, "Review of Taxation."

Appeal must be from judgment.— The appeal contemplated in section 342 of the Municipal Court Act relating to the review of a taxation of costs is an appeal from the judgment and not an appeal from the separate order reviewing the taxation. *Semble*, that as it is the practice in the Municipal Court, after the affirmance of a judgment by the Appelate Division, to enter a new judgment containing the costs upon appeal, the remedy of the party claiming that an excessive amount of costs was allowed is to appeal to the Appellate Division from so much of the judgment as awards the item which he deems to be excessive. *Spiegelman* v. *Union Ry. Co.*, 95 App. Div. 92.

Notes to section 344, "Costs; Affidavit Respecting Disbursements."

Affidavit; witnesses.— Section 344 of the Municipal Court Act forbids allowance of a charge for attendance of witnesses without an affidavit stating the number of days of actual attendance. *Topken* v. *Cunard Steamship Co.*, 43 Misc. Rep. 675.

Costs of appeal to Appellate Term not taxable when cause not brought to hearing.— Costs of an appeal to the Appellate Term cannot be taxed on an appeal from the Municipal Court of New York for failure to cause the return to be filed. Section 345 of the Municipal Court Act forbids costs to either party if the appeal be dismissed because neither party brings it to a hearing. *Poggenberg* v. *Mestuniz*, 46 Misc. Rep. 110.

Notes to section 346, "Costs upon Appeal; Amount."

Exemption as to costs on appeal by the city in action to recover a penalty.— The concluding part of section 29 of the Municipal Court Act provides that "no fees or costs shall be demanded of the said city of New York or any board or officers thereof in any such suit or proceeding." The words "any such suit or proceeding" refer to an action or proceeding to recover a penalty for the violation of any laws or ordinance brought in the manner authorized by section 29. In the

case at bar the plaintiff and appellant, upon its defeat in the court below, had the benefit of the concluding part of the sentence, and it is extremely doubtful whether the exemption as to costs covers the further aggressive proceeding by the appeal. To have the question which is presented in a number of other cases before us settled, the costs of the appeal will be imposed in the order of affirmance and the appellant may have leave to appeal to the Appellate Division. *Health Department of the City of New York* v. *Owen*, Supreme Court, Appellate Term, FREEDMAN, P. J., BISCHOFF and BLANCHARD, JJ., N. Y. Law Journal, December 11, 1903. Reported in 42 Misc. Rep. 221, as to action to recover a penalty from a physician for failure to report facts relative to birth of a child as required by Charter, section 1237.

Notes to section 356, "Fees in Summary Proceedings."

Costs on discontinuance.— Where a landlord voluntarily discontinues before final submission summary proceedings taken by him in the Municipal Court of the city of New York since the passage of Laws 1902, chapter 580, the tenant is entitled as costs to his actual disbursements to the extent of $10 besides the fees of any witnesses attending from another county, and this under Code Civil Procedure, section 3076, subdivision 2. *Cohen* v. *Melle*, 43 Misc. Rep. 79.

§ 350. **Fees on docket of judgment, in a county clerk's office.** — *Repealed by Laws* 1903, *chap.* 144.

Notes to section 361, "Saving Clause."

Right to appeal reserved.— The right of a person who, prior to the time when the New York Municipal Court Act (Laws 1902, chap. 580, § 257) took effect, had recovered a judgment in that court by default to appeal from an order opening the default and setting aside the judgment, was preserved by section 361 of the Municipal Court Act. Such an appeal no longer lies. *Johnson* v. *Manning*, 80 App. Div. 368.

Notes to section 363, "Sections of the Code not Applicable."

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